STRATEGIES IN DRAFTING EFFECTIVE SEPARATION AGREEMENTS

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INTRODUCTION

Whether the occasion is a simple termination or a corporate reduction in force, separation and settlement agreements have become an integral part of the end of an employment relationship. Separation or settlement agreements are essentially contracts between the employer and the employee in which the employee agrees to waive any claim or potential claim he may have against the employer in exchange for pay or benefits beyond that to which the employee is already entitled. A separation agreement "buys peace" for the employer, in the sense that the employee agrees not to assert any legal claims against the employer. For the employee, a separation or settlement agreement can mean additional compensation, benefits or other valuable consideration – such as a neutral reference or outplacement assistance – that the employee otherwise had no right to demand. In addition, a separation agreement can set forth the terms by which the parties will conduct themselves in the future. For example, it may establish that neither party may disparage the other or that the employee will use his best efforts to assist the employer in future litigation or in the protection of intellectual property.

Drafting an enforceable separation or settlement agreement, especially where it is quite common for employers to use "form" releases or separation agreements, can be challenging. An employer must be aware of the constantly changing statutory requirements of a separation agreement and of the challenges an employee may assert to enforce the agreement. Moreover, recurring changes as to how payments under a settlement agreement are treated under the Internal Revenue Code have a significant impact on the dynamics of negotiating these agreements.

This paper will discuss the legal issues associated with the use of separation or settlement agreements, the claims an employee may be able to assert against his employer, the law governing waiver of those claims and the tax issues raised by the use of such agreements. In addition, this paper will offer practical advice for negotiating a separation or settlement agreement. Several examples of form agreements are contained in the appendices, although again, there is no one form that fits the varied circumstances of each termination.

I. WHEN IS AN EMPLOYMENT SEPARATION AGREEMENT DESIRABLE?

The following situations are typical of those in which a separation agreement is desirable:

1. a termination in which the employee has already asserted a claim against the employer;

2. a termination in which the employer is concerned that the employee will likely assert a claim; and

3. a termination in which the employer is willing to provide extra pay or benefits above and beyond what the employee would normally be entitled to under the circumstances of their separation, but only in return for a waiver of claims.

However, the employer must carefully think through the consequences of asking for a waiver of claims. By asking for a waiver, the employer may inadvertently suggest to the employee for the first time that he or she has a claim against the employer.

Moreover, when no actual dispute has been raised by the employee at or before the time of termination, and the employer requests a release to cover claims that are only potential, there is danger that, if the employee refuses to execute the release, the request for the release may be admissible as evidence to raise an inference that the employer committed misconduct in connection with the termination. *See Cassino v. Reichhold Chem.*, 817 F.2d 1338 (9th Cir.), *cert. denied*, 484 U.S. 1047 (1988).

A separation agreement may nevertheless be beneficial because:

1. a separation agreement memorializes the terms on which the employment relationship is being terminated; and

2. the agreement almost always contains a waiver of employment claims in return for special consideration. Such an agreement "buys peace" by ensuring that the terminated employee will not be able subsequently to assert a claim arising from the termination or any prior event.

Also, if the release is sought during actual negotiations over disputed claims that have been raised and pursued by the employee at or before the time of termination, the request for and contents of any proposed release should not be admissible as evidence against the employer. FED. R. EVID. 408; *see Pierce v. F.R. Tripler & Co.*, 955 F.2d 820, 827 (2d Cir. 1992).

In sum, while releases in separation agreements are desirable to compromise and end disputes existing at the time of termination or likely to be raised by the employee in the future, caution is advisable when the dispute is only potential and has not been raised by the employee.

II. WHAT CLAIMS COULD A TERMINATED EMPLOYEE ASSERT?[1]

A. Breach of Contract

1. Relief

a. The measure of damages is economic loss, *i.e.*, past and future lost wages and benefits.

b. Absent extreme circumstances, emotional distress damages are not available for breach of contract.

[1] The types of common law claims a terminated employee may assert, as well as the relevant time limitations for bringing claims and the relief available, vary by state.

c. Punitive damages are generally not recoverable.

d. Injunctive relief (*e.g.*, reinstatement) is not readily available.

2. **Summary disposition**

a. If the employment is found to be terminable at-will, summary disposition of the employee's claim may be possible.

b. If an employment contract is found to require cause to terminate, the determination of cause is usually a highly fact-sensitive issue, which makes obtaining summary judgment difficult.

B. Breach of the Covenant of Good Faith and Fair Dealing

1. **Relief**

a. Most jurisdictions do not recognize this cause of action in the typical employment context because, in the absence of an "explicit restriction" in a contract of employment for an indefinite term, amounting to an "express" agreement limiting the employer's "unfettered right to terminate at will," no obligation to terminate only for cause will be implied to abridge the at-will nature of the contract. *See Guz v. Bechtel National, Inc.*, 24 Cal. 4th 317 (2000); *Horn v. New York Times*, 790 N.E.2d 753 (N.Y. 2003).

b. In most other jurisdictions, tort damages are not available for breach of the covenant in the employment context; the relief available for breach of the covenant of good faith and fair dealing is therefore similar to the relief available for breach of contract. *See, e.g., Foley v. Interactive Data Corp.*, 47 Cal. 3d 654 (1988).

c. In a few jurisdictions, tort damages are available for breach of the implied covenant in the employment context. *See, e.g., Prout v. Sears Roebuck & Co.*, 772 P.2d 288 (Mont. 1989); *K Mart Corp. v. Ponsock*, 732 P.2d 1364 (Nev. 1987).

2. **Summary disposition**

a. Where this cause of action is recognized, there is generally the same likelihood of summary disposition as there is with a claim for breach of an employment contract. Indeed, if the duty of good faith and fair dealing is interpreted as involving more than just a duty to terminate only for cause, the chances of summary disposition are even less.

C. Termination in Violation of Public Policy

1. Nature of claim

a. Most states now recognize a cause of action when an employee is terminated for performing an act that public policy would encourage or for refusing to do something that public policy would condemn. Although legislatures and courts differ in their views of what constitutes "public policy," there is a general agreement that employers should not be allowed to discharge employees for reasons that are contrary to a clearly established policy of the state. The California Supreme Court has clarified that claims for wrongful termination in violation of public policy in California must be based on either a constitutional or statutory provision. *Gantt v. Sentry Ins.*, 1 Cal. 4th 1083 (1992). The New Jersey Supreme Court recognizes a broader scope of sources of "public policy," including legislation; administrative rules, regulations or decisions; judicial decisions; and, in some instances, professional codes of ethics. *Pierce v. Ortho Pharmaceutical Corp.*, 417 A.2d 505, 512 (N.J. 1980).

b. Only a few states do not recognize common law "public policy" causes of action. *See, e.g.*, *Wieder v. Skala*, 80 N.Y.2d 628 (N.Y. 1992) (no common law public policy claim under New York law); *Howard v. Wolff Broadcasting Corp.*, 611 So.2d 307 (Ala. 1992), *cert. denied*, 507 U.S. 1031 (1993) (no common law public policy claim under Alabama law); *Blair v. Physicians Mut. Ins. Co.*, 496 N.W.2d 483 (Neb. 1993) (placing in question whether any public policy exception to at-will doctrine exists under Nebraska law).

2. Relief

a. Economic loss damages.

b. Emotional distress damages (assuming no workers' compensation bar).

c. Punitive damages (in some jurisdictions).

d. Possible injunctive relief.

3. Summary disposition

a. Assuming that a defined and judicially recognized public policy is at stake, because the essential issue is whether the employer acted

against public policy in terminating the employee, the determination of the claim is usually a fact-sensitive question, making summary disposition unlikely.

D. Discrimination

1. Nature of Claim

a. Federal statutes prohibit the making of employment decisions based on age, sex, race, color, religion, pregnancy, national origin and disability. State laws, and often local ordinances, generally include these as protected characteristics and, varyingly, add such other categories as marital status, sexual orientation, arrest records and the assertion of a workers' compensation claim to the protected list.

2. Time to sue

a. Under Title VII of Civil Rights Act of 1964 (race, color, national origin, sex, religion, pregnancy), the employee has 180 days (300 days in jurisdictions with a state or local fair employment practices agency) in which to file a claim with the U.S. Equal Employment Opportunity Commission ("EEOC"). 42 U.S.C. § 2000e-5(e).

b. A claim under 42 U.S.C. § 1981 (race, national origin) is generally governed by the relevant state statute of limitations applicable to personal injury claims.

c. Under the Age Discrimination in Employment Act ("ADEA") (age), the employee has 180 days (300 days in jurisdictions with a state or local agency) in which to file a claim with the EEOC. 29 U.S.C. § 626(d).

d. Likewise, under the Americans with Disabilities Act ("ADA") (disability), the employee has 180 days (300 days in jurisdictions with a state or local agency) in which to file a claim with the EEOC. 42 U.S.C. § 12133.

e. Under state anti-discrimination statutes and local ordinances, the time in which to file a claim with the state agency or in court will vary by state. In many such jurisdictions, exhaustion of administrative remedies (*i.e.*, an administrative filing and dismissal or hearing) is an essential prerequisite before a lawsuit may be filed in court. In New York, on the other hand, a plaintiff who proceeds through the state administrative process to the taking of

testimony at a public hearing has irrevocably elected the administrative forum and may not proceed in court. *See Postema v. National League of Professional Baseball Clubs*, 799 F. Supp. 1475 (S.D.N.Y. 1992), *rev'd on other grounds*, 998 F.2d 60 (2d Cir. 1993).

3. **Relief**

a. Previously under Title VII, only economic loss damages could be recovered, and only in bench trials, although injunctive relief (*e.g.*, reinstatement, hiring, or cease and desist orders) was also available. *Shah v. Mt. Zion Hospital & Medical Ctr.*, 642 F.2d 268, 272 (9th Cir. 1981). However, subject to certain limits, the Civil Rights Act of 1991 (Pub. L. 102-166, 105 Stat. 1071 (1991)) authorizes compensatory and punitive damages of up to $300,000 under Title VII in cases of "intentional discrimination," and, when such damages are sought, the plaintiff is entitled to a trial by jury. These remedies are also now available for claims under the employment provisions of the ADA and for claims under the Rehabilitation Act of 1973, 29 U.S.C. §§ 701, *et seq.*

b. Under 42 U.S.C. § 1981, economic loss, emotional distress and punitive damages are recoverable. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975). In the recent past, discriminatory actions by employers toward employees which occurred after the formation of the employment contract were not actionable under section 1981. The Civil Rights Act of 1991 changed this, and post-formation conduct (*i.e.*, such claims as promotions, demotions, discharges and harassment) is now actionable under this section.

c. Under the ADEA, economic loss damages and injunctive relief may be recovered. 29 U.S.C. § 626(d). Liquidated damages ("double damages") are also recoverable in cases of "willful" discrimination. *Id.*

d. Under state anti-discrimination statutes, economic loss, emotional distress and punitive damages may be recovered, depending on the state and the forum (judicial or administrative).

e. Under most anti-discrimination statutes, the employee may recover costs and attorneys' fees.

4. **Summary disposition**

a. If there is significant evidence of discriminatory intent or evidence which controverts the employer's stated reason for the termination, the claim will usually be decided only after a trial. Jury trials in Title VII, ADA and Rehabilitation Act cases are restricted to cases in which there is a claim for compensatory or punitive damages. Because compensatory and punitive damages are unavailable in disparate impact cases, jury trials are not available in such cases under Title VII. The availability of a trial by jury under state anti-discrimination statutes varies by state.

E. Other Claims

1. Theories

a. Intentional and negligent infliction of emotional distress (assuming no workers' compensation bar).

b. Fraud, negligent misrepresentation, promissory estoppel.

c. Defamation (slander, libel).

d. Invasion of privacy (common-law, constitutional theories).

e. Unfair business practices.

f. Intentional interference with contractual relations or prospective economic advantage.

g. Violation of the Fair Labor Standards Act and comparable state wage-and-hour laws.

h. Violation of the Family and Medical Leave Act and comparable state leave laws.

i. Violation of the Uniform Services Employment and Reemployment Rights Act.

j. Violation of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§ 1001, *et seq*.

k. Violation of the Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. §§ 2101, *et seq*.

2. Relief

a. Economic loss, compensatory damages, punitive damages, statutory penalties and costs and attorneys' fees are recoverable, depending on the theory on which relief is sought, or, in the case of a statutory cause of action, the terms of the statute.

3. **Summary disposition**

a. Most of these claims are fact-determinative, which can preclude summary judgment in the absence of admitted common law or statutory defenses.

III. WHAT IS THE LAW GOVERNING EMPLOYEE WAIVER OF CLAIMS?

A. Federal Law Claims

Federal law claims are generally waivable. *See, e.g.*, *United States v. Allegheny-Ludlum Indus. Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) (Title VII); *Stroman v. West Coast Grocery Co.*, 884 F.2d 458 (9th Cir. 1989), *cert. denied*, 498 U.S. 854 (1990) (same); *O'Shea v. Commercial Credit Corp.*, 930 F.2d 358 (4th Cir.), *cert. denied*, 502 U.S. 859 (1991) (ADEA); *O'Hare v. Global Natural Resources, Inc.*, 898 F.2d 1015 (5th Cir. 1990) (same); *Runyan v. National Cash Register Corp.*, 787 F.2d 1039 (6th Cir.), *cert. denied*, 479 U.S. 850 (1986) (same); 29 C.F.R. part 1627 (ADEA claimant may waive claim without EEOC supervision and approval); *Finz v. Schlesinger*, 957 F.2d 78 (2d Cir.), *cert. denied*, 506 U.S. 822 (1992) (ERISA). *See also* 42 U.S.C. § 2000e-5(b) (promoting conciliation of employment disputes); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), *overruled in part on other grounds by, Albertson's Inc. v. UFCW*, No. 96-0398, 1997 U.S. Dist. LEXIS 4554 (D. Idaho Mar. 10, 1997), and *Rosenberg v. Merrill Lynch*, 965 F. Supp. 190 (D. Mass. 1997), *Martinez v. Asset Protection & Sec. Servs., L.P.*, No. B-05-241, 2006 U.S. Dist. LEXIS 27553 (S.D. Tex. May 9, 2006) (employee may presumably waive his cause of action under Title VII).

1. **FLSA**

An exception is made for waiver of claims under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, *et seq.* Disputes over FLSA coverage may not be compromised without Department of Labor involvement. *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108 (1946); *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697 (1945). However, bona fide disputes over hours may be compromised. *Strand v. Garden Valley Tel. Co.*, 51 F. Supp. 898 (D. Minn. 1943). *See also Coventry v. U.S. Steel Corp.*, 856 F.2d 514, 521-22 (3d Cir. 1988) (discussing FLSA exception to general recognition of waivers and comparing it with employee's ability to waive rights under ADEA).

2. **FMLA**

Depending on the jurisdiction in which the employer operates, another exception may be made for waiver of claims under the Family and Medical Leave Act ("FMLA"), 29 U.S.C.

§§ 2601, *et seq.* The Department of Labor ("DOL") regulation 29 C.F.R. § 825.220(d) states that "employees cannot waive, nor may employers induce employees to waive, their rights under FMLA." Over the objection of the DOL, the Fourth Circuit in *Taylor v. Progress Energy, Inc.*, 493 F.3d 454 (4th Cir. 2007) held that the plain language of section 825.220(d) precludes both prospective and retrospective waivers of FMLA rights. *But see Dougherty v. TEVA Pharms. USA*, No. 05-CV-2336, 2008 U.S. Dist. LEXIS 13255 (E.D. Pa. Feb. 20, 2008) (section 825.220(d) does not prohibit an employee from waiving *past* FMLA claims as part of a severance agreement or a settlement). However, the Fifth Circuit in *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316 (5th Cir. 2003), held that the DOL regulations only apply to the waiver of substantive rights, such as rights of leave and reinstatement, by *current* employees. Thus, under *Faris*, a former employee who signed a valid waiver releasing all claims could not maintain an action under the FMLA.

On February 11, 2008, the DOL proposed regulation changes that appear to disagree with *Taylor* and specifically provide that employees and employers should be permitted to voluntarily agree to the settlement of past claims without having to first obtain the permission or approval of the DOL or a court. *See* 73 Fed. Reg. 7876. Prospective waivers would continue to be unenforceable. The comment period for these proposed regulations ended April 11, 2008, but it could be as long as nine months to a year before the regulations are finalized. However, a certification petition was filed in *Taylor*, and the Supreme Court asked the Solicitor General to file a brief expressing the views of the United States on whether the FMLA precludes private settlement or release of claims.

In his brief, Solicitor General Clement stated that he believes the Fourth Circuit erred by not giving due deference to the governing agency's interpretation of the regulation. *See* Susan J. McGolrick, *Clement Advises Justices Not to Review DOL Regulation on Waivers of FMLA Rights*, BNA DAILY LABOR REPORT, May 27, 2008, at AA2 (discussing Brief for United States as Amicus Curiae, Progress Energy, Inc. v. Taylor, U.S. (2008) (No. 07-539)). Clement noted that unlike the FLSA, the FMLA's "policy considerations are 'much more akin' to those underlying the federal employment discrimination statutes, 'all of which have been construed to permit unsupervised settlement of claims.'" *Id.* Solicitor General Clement also articulated the belief that the Supreme Court does not need to review the case because the DOL's proposed changes to the regulation would effectively settle the issue and clarify 29 C.F.R. § 825.220(d). In accordance with the Solicitor General's opinion, the Supreme Court denied review of the Fourth Circuit's decision on June 16, 2008. *Progress Energy, Inc. v. Taylor*, No. 07-539, 2008 U.S. LEXIS 4952 (U.S. June 16, 2008).

3. Title VII, ADEA, and USERRA

Unions may not waive an employee's ADEA or Title VII rights through collective bargaining. See, *e.g.*, *EEOC v. Board of Governors of State Colleges and Universities*, 957 F.2d 424 (7th Cir.), *cert. denied*, 506 U.S. 906 (1992).

At least one court has held that the right to file a charge of discrimination with the EEOC is not waivable, even if the right to personal relief under anti-discrimination statutes is waivable. *EEOC v. Cosmair, Inc., L'Oreal Hair Care Div.*, 821 F.2d 1085 (5th Cir. 1987). Also, settlement with an individual discrimination plaintiff does not automatically terminate the EEOC's jurisdiction to investigate a perceived violation or prosecute a charge where the agency itself wishes to litigate an enforcement action; thus, even when an employer settles with an individual charging party, the EEOC may still proceed to obtain injunctive relief requiring future compliance and prohibiting retaliation. *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539 (9th Cir. 1987).

One California appellate court has ruled that a broad employment separation agreement, including a release of claims under "any other federal or state law," could not be enforced with regard to claims under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. §§ 4301, *et seq.* *Perez v. Unline, Inc.*, 157 Cal. App. 4th 953 (Cal. Ct. App. 2007). This decision should be contrasted against a federal district court that held that some claims under USERRA, such as the right to reemployment, may be waivable if expressly mentioned in the release. *Wrigglesworth v. Brumbaugh*, 121 F. Supp. 2d 1126 (W.D. Mich. 2000) (applying interpretation and reasoning from predecessor statute to claims under USERRA to determine that claims may be waivable where expressly mentioned).

4. ERISA

Under ERISA, an employer may not condition payment of an already established severance benefit upon the employee's execution of a release. *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985). However, an employer may include a release provision which makes the payment of any severance conditional on the execution of a release when first creating a severance program, or in a properly promulgated amendment. *Harlan v. Sohio Petroleum Co.*, 677 F. Supp. 1021 (N.D. Cal. 1988); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996) (employer may require release of all employment-related claims in exchange for enhanced retirement or severance benefits without violating ERISA).

5. OWBPA

The Older Workers Benefit Protection Act ("OWBPA"), 29 U.S.C. §§ 621, *et seq.*, imposes substantial requirements on agreements containing waivers of ADEA claims. *See* discussion *infra* "Recent Case Law Regarding OWBPA Releases" Part F(1).

B. State Law Claims

State law claims are generally waivable. However, certain state statutes expressly provide that their provisions may not be waived. For example, under New York law, an

individual may not waive his or her right to receive workers' compensation benefits (Workers' Compensation Law, Art. 2 § 32) or to receive unemployment insurance benefits (Labor Law, Art. 18 § 595(1)). *See also* CONN. GEN. STAT. § 31-272(a) (individual may not waive right to receive unemployment compensation); N.J. STAT. ANN. § 43:21-15 (same). Note that although an individual may not waive his/her right to assert a claim for workers' compensation benefits under New York law, it may be permissible for an individual to waive his/her right to bring a *retaliation* claim under the Workers' Compensation Law. *See Warden v. E.R. Squibb & Sons*, 840 F. Supp. 203 (E.D.N.Y. 1993).

In addition, under New York law, an individual who receives severance pay or dismissal payments from a former employer is not "employed" by that employer for unemployment benefits purposes; thus, the individual is not precluded from also receiving unemployment benefits. *See* Labor Law § 517(h) (dismissal payments do not constitute "remuneration" under statute and thus may not be used to determine eligibility for unemployment benefits); *In re Claim of Baxter*, 552 N.Y.S.2d 711 (N.Y. App. Div. 3d Dep't 1990) (severance pay does not constitute remuneration); 12 N.Y.C.R.R. § 490.5(b) (employee's "employment" is terminated after last day he/she was required to *report for work*, even if he/she received payments from employer in addition to remuneration for period in which he/she performed actual services).

However, a *backpay* award constitutes "wages" under unemployment benefits law; thus, a claimant is not entitled to unemployment benefits for the period covered by the backpay award. *See In re Claim of Hernandez*, 468 N.Y.S.2d 63 (N.Y. App. Div. 3d Dep't. 1983), *aff'd*, 63 N.Y.2d 737 (1984).

Under California law, employees were historically required to specifically waive the protection of California Civil Code § 1542, which states that "claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor." However, several appellate courts have not *required* an explicit waiver of section 1542. *See Perez v. Unline*, 157 Cal. App. 4th 953 (Cal. Ct. App. 2007) (plaintiff testified he understood he was releasing claims arising under all statutes the agreement referred to, and even those he did not understand and this knowledge was sufficient to withstand the provision of section 1542); *Skrbina v. Fleming Companies*, 45 Cal. App. 4th 1353 (Cal. Ct. App. 1996) (even though no waiver existed, court upheld validity of release and opined that release provision are binding on the signatories and enforceable so long as they are clear, explicit and comprehensible in each of their essential details and when read as a whole, clearly notify the prospective releaser or indemnitor of the effect of signing the agreement). The best practice however, is to include a waiver of rights under this section in all California releases and, in doing so, set forth the language of the section verbatim.

Also under California law, a waiver of claims under the Fair Employment and Housing Act ("FEHA"), Cal. Gov. Code sections 12900, *et seq.*, need not meet the standards for waivers under the Older Workers Benefits Protection Act, 29 U.S.C. §§ 621, *et seq.* *Skrbina v. Fleming Companies*, 45 Cal. App. 4th 1353 (Cal. Ct. App. 1996).

The payment of wages and other benefits due and owing under state law may not be conditioned upon the employee's execution of a release.

C. Specific Grounds Upon Which an Employee May Limit the Scope or Disavow the Effect of a Release

1. Overbroad

Courts tend to construe employee releases narrowly and tend to limit them to claims explicitly released. *See, e.g.*, *Brown v. B & D Plastics*, 873 F. Supp. 1511 (M.D. Ala. 1994) (holding that "given the express language of the Agreement and the logical inferences that may be reasonably drawn therefrom, the Court finds that the Agreement pertains only to worker's compensation and claims related thereto," and not to plaintiff's Title VII claim); *Okonko v. Union Oil Co.*, 519 F. Supp. 372 (C.D. Cal. 1981) (waiver of Title VII claim held not to encompass § 1981 claim or breach of contract claim).

2. Not Knowing and Voluntary

To determine whether a release by an employee was knowing and voluntary, some circuits apply ordinary contract principles and focus on the clarity of the language in the release. In these circuits, where clear and explicit language is used, an employee will be bound by his or her written release absent a claim of duress, coercion or fraud. *Runyan v. National Cash Register Corp.*, 787 F.2d 1039, 1044 n.10 (6th Cir.) (en banc) (waiver of ADEA rights), *cert. denied*, 479 U.S. 850 (1986); *Pilon v. University of Minnesota*, 710 F.2d 466 (8th Cir. 1983); *Samman v. Wharton Econometric Forecasting Assocs.*, 577 F. Supp. 934 (D.D.C. 1984).

Other circuits consider the "totality of the circumstances," looking beyond the language of the release to consider all of the relevant factors. *See, e.g.*, *Bormann v. AT&T Communications Inc.*, 875 F.2d 399 (2d Cir.), *cert. denied*, 493 U.S. 924 (1989); *Torrez v. Public Service Co.*, 908 F.2d 687 (10th Cir. 1990) (Title VII, § 1981); *Cirillo v. Arco Chemical Co., Div. of Atlantic Richfield Co.*, 862 F.2d 448 (3d Cir. 1988) (waiver of ADEA rights); *O'Hare v. Global Natural Resources, Inc.*, 898 F.2d 1015, 1017 (5th Cir. 1990); *Beadle v. City of Tampa*, 42 F.3d 633 (11th Cir.), *cert. denied*, 515 U.S. 1152 (1995) (Title VII).

For example, the Second Circuit in *Bormann* explained that the following "relevant factors" must be considered to determine whether a waiver under the ADEA was executed knowingly and voluntarily: (1) the plaintiff's education and business experience; (2) the amount of time the plaintiff had to consider the agreement before signing it; (3) the plaintiff's role in deciding the terms of the agreement; (4) the clarity of the agreement; (5) whether the plaintiff was represented by or consulted with an attorney; and (6) whether the consideration given in exchange for the waiver exceeded the amount of benefits the employee was already entitled to receive. 875 F.2d at 403. *See also Williams v. Phillips Petroleum Co.*, 23 F.3d 930 (5th Cir.), *cert. denied*, 513 U.S. 1019 (1994) (applying a totality of circumstances test to a release of an employee's Worker Adjustment and Retraining Notification Act ("WARN") claim). Note that if an employee "knowingly and voluntarily" executes a release, the employee violates the release if

he/she brings an action against the employer upon a "released" claim. The employer, therefore, may be entitled to damages for the employee's breach. *See Glugover v. Coca Cola Bottling Co.*, No. 91 Civ. 6331, 1994 U.S. Dist. LEXIS 14182 (S.D.N.Y. Oct. 5, 1994) (awarding employer nominal damages in amount of one dollar ($1.00)).

Although the Older Workers Benefit Protection Act amendments to the ADEA (enacted after *Bormann*) have codified the precise requirements necessary for a release to be valid under the ADEA (*see* discussion *infra* "The Requirements of the Older Workers Benefit Protection Act" Part F(1)), the *Bormann* factors may nonetheless be utilized outside of the ADEA context. *See, e.g.*, *Torrez v. Public Serv. Co.*, 908 F.2d 687 (10th Cir. 1990) (applying *Bormann*-like factors to releases under Title VII and section 1981).

3. **Future Claims**

As a matter of law, a release extends only to present and past claims; future claims may not be released. *Redel's, Inc. v. General Elec. Co.*, 498 F.2d 95 (5th Cir. 1974); *Wagner v. Nutrasweet Co.*, 873 F. Supp. 87 (N.D. Ill. 1994); *Adams v. Philip Morris, Inc.*, 67 F.3d 580 (6th Cir. 1995).

4. **Duress**

An employee may be able to disavow a release if the employee can demonstrate that the release was not executed voluntarily. If the execution of a release is the result of duress or coercion, the release is invalid. *See, e.g.*, *Beadle v. City of Tampa*, 42 F.3d 633 (11th Cir.), *cert. denied*, 515 U.S. 1152 (1995) (holding that plaintiff's release was not knowingly and voluntarily executed where, based on plaintiff's "stressful financial situation," he did not have "fair opportunity" to consult with his attorney); *Boyd v. Adams*, 513 F.2d 83 (7th Cir. 1975) (release extracted in return for dismissal of criminal charges set aside). Indicia of coercion or undue pressure include:

a. conditioning benefits to which the employee is already entitled by law or company policy or practice upon execution of the release; such as accrued but unused vacation time or, depending on the company's policy or practice, severance pay. *See Wagner v. Nutrasweet Co.*, 873 F. Supp. 87 (N.D. Ill. 1994) (noting that "redeployment pay" received by plaintiff did not constitute "consideration" because she was already entitled to such monies under WARN Act);

b. providing an unduly short time to consider the release. *See, e.g., Dytrt v. Mountain State Tel. & Tel. Co.*, 921 F.2d 889 (9th Cir. 1990) (election to retire found involuntary when, although employee had received plan materials over one month earlier, she had less than one day to consider options after being informed that her job was being eliminated); *Paolillo v. Dresser Indus., Inc.*, 821

F.2d 81 (2d Cir. 1987) (election to retire found involuntary because of shortness of time to decide on acceptance). *See also Bodnar v. Synpol, Inc.*, 843 F.2d 190, 193-94 (5th Cir.), *cert. denied*, 488 U.S. 908 (1988) (15-day period given employees to consider options deemed sufficient to avoid finding that election to accept early retirement plan was involuntary); *Holden v. Kemper Sec.*, No. 94 C 347, 1994 U.S. Dist. LEXIS 5886 (N.D. Ill. May 5, 1994) (holding that "[t]he weakness in plaintiff's case is that (1) she did not sign *so quickly* that one could say that she signed because she was in urgent need of money and had no time to consult with counsel, and (2) she signed it far enough in advance of the deadline so that she was not forced with the immediate choice of signing the release as it was or losing part of the benefit package.") (emphasis added);

c. paying grossly inadequate consideration for the release (not to be confused with consideration to which the employee has a pre-existing right, as in (a), *supra*). *See, e.g., Mosley v. St. Louis Southwestern Ry.*, 634 F.2d 942 (5th Cir.), *cert. denied*, 452 U.S. 906 (1981).

5. **Fraudulent Inducement**

A release may be set aside if an employee can show that he or she was induced by fraud into signing the release. *See Shaheen v. B.F. Goodrich Co.*, 873 F.2d 105 (6th Cir. 1989). Generally, to prevail under a fraudulent inducement theory, the employee must show that the employer has affirmatively misrepresented a material element, followed by detrimental reliance by the employee. *See Rilling v. Burlington N. R.R.*, 31 F.3d 855 (9th Cir. 1994). In *Rilling*, the employee asserted that he was fraudulently induced into signing a settlement agreement because the employer had not told him that it was also being sued in another action by a similarly situated plaintiff. (Similarly situated plaintiff did not accept employer's settlement offer and ultimately prevailed in court upon damage computation theory more favorable than one contained in employee's settlement agreement). The court, however, refused to find that the release was procured by fraud because the employee could point to no *affirmative* misrepresentations by the employer; the employer simply did not tell him about the other litigation, it did not tell him "something which was false." *Id.* at 859. *See also Fortino v. Quasar Co.*, 950 F.2d 389, 395 (7th Cir. 1991) (upholding release which employee signed after he had erroneously been told by lawyer that release would be unenforceable, but when he was aware of what he was giving up under language of release); *Kroggel v. Runyon*, No. 92-1995, 1993 U.S. App. LEXIS 12589 (7th Cir. Apr. 20, 1993) ("That plaintiff's counsel may have inaccurately conveyed the effect of the release does not establish fraud or undue influence.").

6. Mutual Mistake

A release may also be voided if the employee can show the parties signed the release based on a mutual mistake. *See Scotts Co., LLC v. Ace Indem. Ins. Co.*, No. 52542U, slip op. (N.Y. Misc. Feb. 28, 2007).

7. Unconscionability Under California Law

Generally speaking, a release may also be void if a court finds that a party was in a weaker or unequal bargaining position and was presented with an agreement on a "take-it-or-leave-it" basis, which agreement was oppressive, overly harsh, or lacked mutuality. *See Discover Bank v. Superior Court*, 36 Cal. 4th 148, 160 (2005); *see also A&M Produce Co. v. FMC Corp.*, 135 Cal. 3d 473, 492 (1982) (unconscionability found when the parties were of unequal experience and the stronger party attempted to limit its liability); *24 Hour Fitness, Inc. v. Superior Court*, 66 Cal. App. 4th 1199, 1213 (Cal. Ct. App. 1998) (provision is substantively unconscionable if it involves contract terms that are so one-sided as to 'shock the conscience,' or that impose harsh or oppressive terms). Similarly, the Ninth Circuit has found release provisions to be unenforceable based on unconscionability. *See Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1076-81 (9th Cir. 2007) (provision in an arbitration agreement that banned all lawsuits and most administrative claims, except those filed with specifically listed agencies, substantively unconscionable). Each state uses its own standard for determining whether an agreement taken as a whole is unconscionable, however, so employers must familiarize themselves with the standards in the jurisdictions in which they operate.

D. The "Ratification" Defense

Even when a release is assumed not to have been executed voluntarily and knowingly, traditional principles of contract law provide that an employee may be found to have ratified a release by retaining benefits received in exchange for the release. *See, e.g., Anselmo v. Manufacturers Life Ins. Co.*, 771 F.2d 417, 420 (8th Cir. 1985) (former employee reaped the benefits of release waiver by accepting employer's check and cashing it, representing that he had resigned instead of being terminated, and receiving favorable references from former employer; these actions were in accordance with the waiver and thus ratified the contract "thereby waving any claim of duress he may otherwise have had"); *Alphonse v. Northern Telecom, Inc.*, 776 F. Supp. 1075, 1078-79 (E.D.N.C. 1991) (even if releases were obtained by employer's fraud, employees' retention of severance and other pecuniary benefits constituted ratification under North Carolina law).

Further, some courts have determined that an employee who has accepted benefits in exchange for a release may challenge the release, but must first tender back the consideration received unconditionally and promptly. *See e.g., Grillet v. Sears Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991). In *Williams v. Phillips Petroleum Co.*, 23 F.3d 930, 937 (5th Cir.), *cert. denied*, 513 U.S. 1019 (1994) the Fifth Circuit reasoned:

> *Even if a release is tainted by misrepresentation or duress, it is*

ratified if the releasor retains the consideration after learning that the release is voidable. A person who signs a release, then sues his or her employer for matters covered under the release, is obligated to return the consideration. Offering to tender back the consideration after obtaining relief in the lawsuit would be insufficient to avoid a finding of ratification.

Further, with regard the specific context of ADEA/OWBPA cases, as set forth in more detail below, *see infra* "Case Law Regarding OWBPA Releases" Part F(1), the U.S. Supreme Court's decision in *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998) resolved a split among the circuit courts of appeal on the ratification issue

E. The Requirements of the Older Workers Benefit Protection Act, 29 U.S.C. §§ 621 *et seq*. ("OWBPA")

Many of the requirements with respect to waiver of ADEA claims have been codified by this statute which was enacted in 1990. The OWBPA requires that to waive an ADEA claim, the waiver must be "knowing and voluntary." To be deemed knowing and voluntary under the OWBPA, the waiver must:

1. be part of a written agreement that is readily understandable by the employee;

2. refer specifically to claims under the ADEA;

3. not encompass future ADEA claims;

4. be given in exchange for consideration that is over and beyond any benefit to which the employee is already entitled;

5. provide in writing that the employee is advised to consult with an attorney before signing the waiver; and

6. give the employee adequate time to consider the waiver before signing it. In the case of an individual termination, the employee must be given 21 days to consider the waiver. In the case of an exit-incentive or other employment-termination program offered to a group of employees, at least 45 days must be given. In either case, the employee has 7 days after signing in which to revoke the waiver. However, in the case of settlement of court proceedings or settlements with the EEOC, "a reasonable period of time" to consider the waiver is acceptable.

7. In the case of a group exit-incentive program, the employer must also disclose in writing:

a. the groups of employees eligible for the program;

b. the program requirements;

c. any time limitations under the program; and

d. the job titles and ages of all employees eligible or selected for the program and the same information for those not eligible or selected.

See 29 U.S.C. § 626(f)(1).

The OWBPA requirements are only minimum requirements and the release is still subject to being set aside for the reasons discussed in "Specific Grounds Upon Which an Employee May Limit the Scope or Disavow the Effect of a Release" Parts 1-7 above. *See Griffin v. Kraft Gen. Foods*, 62 F.3d 368 (11th Cir. 1995).

Note that the *employer* bears the burden of proving that the requirements of the OWBPA have been met and that the waiver was knowing and voluntary. 29 U.S.C. § 626(3).

Even if a release is obtained in compliance with the OWBPA and is otherwise valid, it cannot be used to prevent an employee from reporting a complaint of discrimination to the EEOC (although presumably he or she will personally be barred from further relief) or cooperating with the EEOC in its investigation of suspected discrimination. *See EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529 (2d Cir. 1996).

The OWBPA does not apply to waivers that occurred before its enactment. Pub. L. 101-433 § 202(a), 104 Stat. 984 (1990). *See also Ulvin v. Northwestern National Life Ins. Co.*, 943 F.2d 862 (8th Cir. 1991), *cert. denied*, 502 U.S. 1073 (1992).

Strictly speaking, OWBPA requirements do not apply to waivers of other claims; in the past, courts have not required that all of the OWBPA provisions be satisfied. *See, e.g., Strozier v. General Motors Corp*. (Lakewood Assembly Plant), 635 F.2d 424 (5th Cir. 1981) (specific enumeration of claims not generally required for their valid release); *Tung v. Texaco Inc.*, 150 F.3d 206 (2d Cir. 1998) (dismissing Title VII claim due to knowing and voluntary waiver, but allowing ADEA claim to proceed due to lack of compliance with OWBPA).

Generally, courts have rejected the use of OWBPA requirements as a standard by which to measure the validity of waivers of non-ADEA claims. *See Williams v. Phillips Petroleum Co.*, 23 F.3d 930 (5th Cir.), *cert. denied*, 513 U.S. 1019 (1994) (rejecting employee's argument that OWBPA factors should be applied to release of employee's WARN claim).

The courts may recognize that it would be problematic for employers to ask for two releases, one with the OWBPA requirements for ADEA claims and another without the OWBPA requirements for non-ADEA claims.

F. Case Law Regarding OWBPA Releases

1. Ratification and Tender Back under the OWBPA

In 1998, in *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998), the Supreme Court resolved a split among the circuit courts of appeal as to whether a release under the ADEA must meet *all* the requirements under the OWBPA to be deemed effective. The 6-3 Supreme Court majority found that a release which does not meet the requirements of the OWBPA may *not* be ratified by the employee's retention of the consideration received in return for the release. Previously, several circuits had determined that a release that failed to meet the OWBPA requirements was voidable (not void); thus, the release could be ratified by the former employee's retention of the consideration paid. *Wamsley v. Champlin Refining & Chems.*, 11 F.3d 534 (5th Cir. 1993), *cert. denied*, 514 U.S. 1047 (1995); *Blistein v. St. John's College*, 74 F.3d 1459 (4th Cir. 1996). In direct contrast, other circuits had held that severance agreements not satisfying the OWBPA's requirements could not be ratified by the retention of the consideration paid, and that plaintiffs were not required to tender back the consideration paid to maintain a lawsuit under the OWBPA. *Oberg v. Allied Van Lines*, 11 F.3d 679 (7th Cir. 1993), *cert. denied*, 511 U.S. 1108 (1994); *Forbus v. Sears Roebuck & Co.*, 958 F.2d 1036, 1040-41 (11th Cir.), *cert. denied*, 506 U.S. 955 (1992).

In *Oubre*, the Supreme Court held that the OWBPA – and not traditional principles of contract law – governed waivers of ADEA rights. Specifically, the Court held that older workers cannot be required to tender back severance payments as a condition precedent to filing suit under the ADEA. Further, a former employee's retention of severance payments does not, and indeed cannot, ratify an ADEA waiver where that waiver was not in compliance with the OWBPA requirements in the first instance.

2. Cure of the Defective Release

As matter of law and public policy, an employer is allowed only one chance to conform to the requirements of the OWBPA. For example, in *Butcher v. Gerber*, 8 F. Supp. 2d 307 (E.D. Pa. 1998), the court held that Gerber did not and could not as a matter of law cure a defective release by issuing a letter to the employees containing OWBPA-required information that was omitted from their separation agreements and requesting that the employees either "reaffirm" their acceptance of or "revoke" the release. The court noted that the statutory language of the OWBPA is silent as to whether employers could have more than one opportunity to satisfy the requirements of the OWBPA and construed this silence as an indication that Congress did not intend to allow employers to cure defective waivers. *Id.* at 319.

The court then explained that:

> *If the statute were to allow employers two or more "bites of the apple," an employer could put off compliance indefinitely. It could obtain waivers from older workers without complying with the OWBPA in the hopes that the employees would not commence a*

> *timely ADEA action. If such an action were then commenced, as it was in this case, the employer could simply "comply" at that time and then raise the defense of release and waiver.*

Id.

Finally, the court explained that Congress enacted the ADEA and OWBPA with the intention of creating incentives for companies to obey the law. *Id.* at 319. The court pointed out that the OWBPA was intended to "ensure[ ] that older workers are not coerced or manipulated into waiving their rights to seek legal relief under the ADEA." *Id.* The court then found that Gerber's noncompliance with the OWBPA, whether deliberate or unintentional, violated the OWBPA. *Id.*

Further, the court noted that even assuming, *arguendo*, that the release could be cured, the letter did not meet the requirements of the OWBPA because it offered no additional consideration to the discharged employees, and thus, it failed to comply with the OWBPA's requirement that waivers must be given in exchange for consideration. *Id.* The court also found that the letter:

1. failed to inform the discharged employees that they could do nothing and continue to receive benefits;

2. failed to inform the discharged employees that the information supplied in the letter was required by the OWBPA; and

3. incorrectly state[d] that the Release was binding.

Id. at 320-321. Accordingly, the court granted the motion for summary judgment and struck Gerber's affirmative defense of waiver.

It is notable that the court did not differentiate between deliberate and unintentional failures to comply with the OWBPA. Although not clearly articulated in its decision, the *Gerber* court appears to have believed that Gerber's failure to comply with the OWBPA was intentional, and that was a crucial factor driving the court's decision. The court may have reached a different conclusion had Gerber's cure attempt been made prior to the commencement of the class action.

3. **Invalid Waiver as a Separate Cause of Action**

A number of courts have refused to permit a suit based solely on an employer's alleged violation of the OWBPA requirements, holding that a failure to meet those requirements cannot create a separate cause of action under the OWBPA and is not a violation of the ADEA. *Whitehead v. Oklahoma Gas & Elec. Co.*, 187 F.3d 1184, 1192 (10th Cir. 1999); *Baker v. Wash. Group Int'l, Inc.*, No. 1:06-CV-1874, 2008 U.S. Dist. LEXIS 9115 (M.D. Pa. Feb. 7, 2008) (the Act cannot be used as a sword that provides plaintiffs with an independent cause of action for affirmative relief); *Syverson v. IBM*, No. C-03-04529, 2007 WL 2904252, *5 (N.D. Cal. Oct. 3,

2007); *Ambers v. Vill. Family Sav. Ctr., Inc.*, 329 F. Supp. 2d 1046 (D.N.D. 2004); *EEOC v. Sears, Roebuck and Co.*, 883 F. Supp. 211 (N.D. Ill. 1995); *EEOC v. Sara Lee Corp.*, 923 F. Supp. 994 (W.D. Mich. 1995); *Williams v. General Motors Corp.*, 901 F. Supp. 252 (E.D. Mich. 1995).

A Massachusetts court, however, has held that an invalid waiver can be an independent cause of action under the ADEA. *See Commonwealth of Massachusetts v. Bull HN Information Sys., Inc.*, 16 F. Supp. 2d 90 (D. Mass. 1998). In *Bull*, an employer's severance plan provided that if an employee who executed a release later brought or maintained a claim covered by the agreement he or she would be required to return all severance paid and must indemnify the employer for all attorney's fees, costs and expenses associated with defending the complaint or claim. An action was brought against the employer solely based on the invalidity of the waiver.

The *Bull* court found that the broad enforcement scheme articulated in §626(c) covers the waiver requirements of §626(f). "If Congress sought to preclude independent enforcement of the waiver conditions – and limit the remedy in the way that some cases have done…it would have either said so explicitly or placed the OWBPA in a different part of the statute." *Id.* at 105. The court explained its view by pointing to the purposes of the OWBPA, to protect the interest of older workers who were vulnerable in waiving their rights to bring ADEA claims against their employers. The court found that by not allowing for an independent cause of action under section 626(f), "employers could functionally insulate themselves from ADEA suits and ignore the waiver provisions of the OWBPA simply by including a drastic penalty provision in the waiver." *Id.* at 106. This, the court found, was directly contrary to the intent of Congress in enacting both the ADEA and the OWBPA provisions.

In a subsequent proceeding, *Commonwealth of Massachusetts v. Bull HN Information Sys., Inc.*, 143 F. Supp. 2d 134, 158 (D. Mass. 2001), the court clarified that OWBPA violations, standing alone, can only support an action for declaratory and injunctive relief, not an action for damages. *See also Krane v. Capital One Servs., Inc.*, 314 F. Supp. 2d 589, 609-10 (E.D. Va. 2004) (agreeing with *Bull* 2001).

4. OWBPA Requirements Not Applied To Non-Age Claims

Thus far, courts have not applied the OWBPA requirements to the release of non-age discrimination claims. Thus, it appears that for non-age discrimination claims, some courts will continue to apply the common law "totality of the circumstances" test to determine if the waiver was knowing and voluntary.[2] Under this test, these courts will consider a number of factors, including, but not limited to: the plaintiff's education, the amount of time the plaintiff had to review the waiver, the clarity of agreement, whether legal assistance was obtained and whether the plaintiff received greater benefits in exchange for the waiver than what he or she was entitled

[2] *See* discussion *supra* Part IV(C)(2) on circuit split pertaining to test used to determine if waiver was knowing and voluntary. Some circuits use "totality of the circumstances" test while others apply ordinary contract principles and focus on the clarity of the language of the release.

to by law. *See e.g., Torrez v. Public Service Co.*, 908 F.2d 687 (10th Cir. 1990); *Stroman v. West Coast Grocery Co.*, 884 F.2d 458, 462 (9th Cir. 1989).

G. EEOC Regulations Regarding OWBPA Releases

In November 1995, the EEOC selected a committee consisting of ten representatives from the plaintiffs' bar and ten representatives from the management bar for the purpose of developing a set of regulations relating to the requirements for releases under the OWBPA. The regulations were approved by the Commissioners and distributed for public comment.

Effective July 6, 1998, the EEOC issued regulations setting forth its interpretation of the waiver provisions of the OWBPA, addressing several items. In general, each item is considered in assessing whether a waiver can be considered "knowing and voluntary." In addition to the items discussed below, a material mistake, omission, or misstatement in the information within a waiver can defeat the waiver. *See* 29 C.F.R. § 1625.22(a)(3). The most important elements of a knowing and voluntary waiver are summarized below:

1. Wording of Waiver Agreements

The entire waiver agreement must be in writing and drafted in plain language, taking into account such factors as the level of comprehension and education of typical participants. Specifically, consideration of these factors usually will require the limitation or elimination of technical jargon and of long, complex sentences. In addition, the release must be written in a fair, even-handed manner such that any advantages or disadvantages described shall be presented without either exaggerating the benefits or minimizing the limitations. Further, the waiver must specifically refer to the ADEA by name. 29 C.F.R. §§ 1625.22(b)(2)-(6).

In *Thomforde v. IBM*, 406 F.3d 500 (8th Cir. 2005), the Eighth Circuit Court of Appeals held that the waiver agreement between Thomforde and IBM was unenforceable, because it was not "written in a manner calculated to be understood by such individual, or by the average individual eligible to participate" as required under the OWBPA. The agreement included a "release," or a provision that released all claims relating to Thomforde's employment, as well as a "covenant not to sue," or a provision forbidding Thomforde from instituting any claim of any kind against IBM relating to his employment, the violation of which would require Thomforde to pay all of IBM's costs and expenses of defending against the suit. In addition, the agreement stated, "This covenant not to sue does not apply to actions based solely under the [ADEA], as amended. That means that if you were to sue IBM… only under the [ADEA], as amended, you would not be liable under the terms of this Release for their attorneys' fees and other costs and expenses of defending against the suit." The Court found that IBM's use of legal terms of art, such as "release" and "covenant not to sue," required it to provide Thomforde an explanation of the provisions; yet, the agreement failed to explain the difference between a release and a covenant not to sue, *and* IBM declined to tell Thomforde what the provisions meant when Thomforde requested an explanation, advising, instead, that Thomforde consult an attorney.

In *Syverson v. IBM*, 461 F.3d 1174 (9th Cir. 2006), *amended by*, 472 F.3d 1072 (9th Cir. 2007), the Ninth Circuit Court of Appeals held that the waiver agreement between Syverson and IBM was unenforceable, because it was not "written in a manner calculated to be understood by such individual, or by the average individual eligible to participate" as required under the OWBPA. As in *Thomforde*, the agreement included a release, a covenant not to sue, and a provision stating, "This covenant not to sue does not apply to actions based solely under the [ADEA], as amended. That means that if you were to sue IBM . . . only under the [ADEA], as amended, you would not be liable under the terms of this Release for their attorneys' fees and other costs and expenses of defending against the suit." *Id.* at 1082. The court found that "far from explaining the intended, independent functions of the release and of the covenant not to sue," the agreement "muttle[d] the matter" by using the terms "release" and "covenant not to sue" interchangeably. *Id.* at 1085. The court also rejected the argument that direction to consult an attorney or IBM employee mitigated any confusing waiver language. *Id.* at 1085-86.

2. **Waiver of Future Rights**

The waiver of rights or claims that arise following the execution of a waiver is prohibited. However, the OWBPA does not bar the enforcement of agreements to perform future employment-related actions, such as the employee's agreement to retire or otherwise terminate employment at a future date in a waiver that otherwise is consistent with statutory requirements. 29 C.F.R. § 1625.22(c)(2).

3. **Consideration**

If a benefit or other thing of value was eliminated in contravention of law or contract, expressed or implied, the subsequent offer of such benefit or thing of value in connection with a waiver will not constitute "consideration" for purposes of the OWBPA. Whether such elimination as to one employee or group of employees is in contravention of law or contract as to other employees, or to that individual employee at some later time, may vary depending on the facts and circumstances of each case. Additionally, an employer is not required to give a person age 40 or older a greater amount of consideration than is given to a person under the age of 40, solely because of that person's membership in the protected class under the ADEA. 29 C.F.R. §§ 1625.22(d)(2)-(4).

4. **Consultation**

The individual should be advised in writing to consult with an attorney prior to executing the agreement. 29 C.F.R. § 1625.22(c)(7). The EEOC regulations echo the statute and provide that an individual must be advised in writing to consult with an attorney prior to signing the agreement. 29 U.S.C. § 626(f)(1)(E). However, the courts have determined that this advice must be specific and written in the initial agreement, and the actual consultation must assist the employee in understanding the agreement. In *Anzueto v. Wash. Metro. Area Transit Auth.*, 357 F. Supp. 2d 27, 32 (D.C. Dist. 2004), the court found the consultation with an attorney requirement was satisfied where the waiver advised the employee "in two places, using bold,

capital letters, to consult with a lawyer before signing the document to ensure a complete understanding of the consequences of agreeing to the Waiver."

5. **Time Periods**

An employee must be given a period of at least 21 days, from the date of the employer's final offer, to consider the agreement, or 45 days in the case of exit incentive programs. Material changes to the final offer restart the running of the 21- or 45-day period; changes made to the final offer that are not material do not restart the running of the 21- or 45-day period. The parties may agree that changes, whether material or immaterial, do not restart the running of the 21- or 45-day period. 29 C.F.R. § 1625.22(e)(4).

An employee may sign a release prior to the end of the 21- or 45-day time period, thereby commencing a mandatory seven-day revocation period. This is permissible as long as the employee's decision to accept such shortening of time is knowing and voluntary and is not induced by the employer through fraud, misrepresentation, or a threat to withdraw or alter the offer prior to the expiration of the 21- or 45-day time period, or by providing different terms to employees who sign the release prior to the expiration of such time period. 29 C.F.R. § 1625.22(e)(6).

However, if an employee signs a release before the expiration of the 21- or 45-day time period, the employer may expedite the processing of the consideration provided in exchange for the waiver. The seven-day revocation period cannot be shortened by the parties, by agreement or otherwise. 29 C.F.R. §§ 1625.22(e)(5)-(6).

6. **Informational Requirements**

In the case of a group exit-incentive program, the employer must disclose certain information to the groups of employees eligible for the program. Employers must be very careful to satisfy all of the informational disclosure requirements or else the release will likely be held invalid. *See Ruehl v. Viacom, Inc*., 500 F.3d 375 (3d Cir. 2007) (release invalid where employer failed to attach required demographic information to the release and failed to adequately inform employee of how to find or request the information); *Kruchowski v. Weyerhauser Co*., 446 F.3d 1090 (10th Cir. 2006) (release was invalid, in part, because the group termination notice provided to the plaintiffs erroneously identified the decisional unit as all salaried employees at the entire mill, when in fact the relevant decisional unit was a smaller group of employees reporting to the mill manager); *Pagliolo v. Guidant Corp.*, 483 F. Supp. 2d 847 (D. Minn. 2007) (court invalid release because the release documentation contained material misrepresentations, failed to describe the affected decisional unit with particularity, failed to disclose the eligibility factors, and ignored regulatory formatting requirements with respect to disclosing the ages and job titles of the affected employees).

A "program" exists when the employer offers additional consideration for the signing of a waiver pursuant to an exit incentive or other employment termination to two or more employees. 29 C.F.R. § 1625.22(f)(1)(iii)(B). "Exit incentive programs" are usually voluntary

programs offered to a group or class of employees where the employees receive consideration, in addition to what they are already entitled, in exchange for their voluntary resignation and execution of a waiver. 29 C.F.R. § 1625.22(f)(1)(iii)(A). "Other employment termination programs" refers to a standardized formula or package of benefits available to a group/class of two or more employees who were involuntarily terminated and who are offered additional consideration in turn for signing a waiver. 29 C.F.R. §§ 1625.22(f)(1)(iii)(A),(B). The program need not constitute an "employee benefit plan" for purposes of ERISA. 29 C.F.R. §§ 1625.22(f)(1)(iii)(A)-(B),(D).

a. To Whom Must the Information Be Given

The required information must be given to each person in the "decisional unit" who is asked to sign a waiver agreement. A "decisional unit" is that portion of the employer's organizational structure from which the employer chose the persons who would be offered consideration for the signing of the waiver. In different circumstances, the decisional unit may be a department, division, job category, facility, multiple facilities, or even some combination of the above. *Burlison v. McDonald's Corp.*, 455 F.3d 1242 (11th Cir. 2006) ("decisional unit" disclosure requirement complied with when terminated employees provided with information regarding their respective regions rather than the nationwide group of employees). Because of the potential complexities in determining what is the appropriate "decisional unit," counsel should often be consulted on this issue.

b. What Information Must Be Given

The employer must disclose the job titles and ages of all employees eligible or selected for the program and the same information for those not eligible or selected. The use of age bands broader than one year (such as "age 20-30") does not satisfy this requirement.

In a termination of persons in several established grade levels and/or other established subcategories within a job category or job title, the information should be broken down by grade level or other subcategory.

If an employer in its disclosure combines information concerning both voluntary and involuntary terminations, the employer shall present the information in a manner that distinguishes between voluntary and involuntary terminations.

If the terminees are selected from a subset of a decisional unit, the employer must still disclose information for the entire population of the decisional unit. For example, if the employer decides that a 10% RIF in the Accounting Department will come from the accountants whose performance is in the bottom one-third of the Division, the employer still must disclose information for all employees in the Accounting Department.

An involuntary termination program in a decisional unit may take place in successive increments over a period of time. Special rules apply to this situation. Specifically, information supplied with regard to the involuntary termination program should be cumulative, so that later

terminees are provided ages and job titles or job categories, as appropriate, for all persons in the decisional unit at the beginning of the program and all persons terminated to date. There is no duty to supplement the information given to earlier terminees so long as the disclosure, at the time it is given, conforms to the requirements of this section. Again, given the multitude of rules in this area, consultation with counsel may often be appropriate to ensure full compliance.

7. Waivers Settling Charges and Lawsuits

A waiver in settlement of a charge filed with the EEOC or an action filed in court alleging age discrimination may not be considered knowing and voluntary unless, among other requirements, the individual is given a "reasonable period of time" within which to consider the settlement agreement. The term "reasonable time within which to consider the settlement agreement" means reasonable under all the circumstances, including whether the individual is represented by counsel or has the assistance of counsel. *See Powell v. Omnicom, BBDO/PHD*, 497 F.3d 124, 127, 132 (2d Cir. 2007) (although plaintiff who brought age discrimination claim in court proceeding had only a few hours to consider the settlement during an in-court settlement conference, it was a "reasonable period of time within which to consider the settlement agreement" because she "had nearly two years between her termination and settlement negotiations to give considered thought to how she wished to resolve the dispute"). In addition, a waiver agreement in compliance with this section that is in settlement of an EEOC charges does not require the participation or supervision of the EEOC.

8. EEOC's Enforcement Powers

No waiver agreement may include any provision prohibiting, or otherwise limiting, any individual from: (a) filing a charge or complaint, including a challenge to the validity of the waiver agreement, with the EEOC or (b) participating in any investigation or proceeding conducted by the EEOC. 29 C.F.R. §§ 1625.22(i)(2)-(3).

Notably, the initial EEOC regulations on OWBPA did not address the issue of tender back in relation to ADEA lawsuits. However, in 1998, the Supreme Court's *Oubre* decision resolved the issue, holding that an employee need not tender back benefits received in exchange for a release in order to file suit for discrimination. *See* discussion *supra* "Case Law Regarding OWBPA Releases" Part F(1). Effective January 10, 2001, the EEOC set forth additional guidelines for ADEA releases, essentially implementing the *Oubre* decision. Those regulations provide:

a. Tender Back

Any provision in a waiver agreement which requires an employee to tender back consideration received as a condition precedent to pursuing an ADEA claim otherwise waived is unlawful. An older worker may retain severance of other benefits even if he or she challenges the validity of the waiver agreement under the ADEA. 29 C.F.R. § 1625.23(a). However, an employer may recover money it paid for a waiver if an older worker successfully challenges the

waiver, proves age discrimination and obtains a monetary award. The employer's recovery is limited to the lesser of: 1) the amount it paid for the waiver initially; or 2) the amount of the award to the prevailing ADEA plaintiff. 29 C.F.R. § 1625.23(c).

b. Covenants Not to Challenge Waiver

Covenants not to challenge a waiver under ADEA have been deemed by the EEOC to be the functional equivalent of an older worker's waiver of the right to sue for age discrimination under ADEA and are therefore subject to OWBPA restrictions and requirements. The regulations also prohibit any clause which would require the person filing a lawsuit to pay damages and attorneys' fees, as the EEOC believes that requiring payment of such remedies would undermine the purpose of the OWBPA and stop most older workers from challenging such waivers. 29 C.F.R. § 1625.23(b).

c. Abrogation

An employer may not abrogate or avoid its duties under a waiver agreement, covenant not to sue, or equivalent arrangement even if there is a successful challenge to the validity of the agreement. Thus, even after an employee commences litigation challenging the validity of a waiver, the employer remains legally obligated to continue whatever payments it agreed to provide. 29 C.F.R. § 1625.23(d).

d. Burden

The *employer* has the burden of proving that the waiver in question is valid. 29 U.S.C. § 626(f)(3).

IV. WHAT ARE THE TAX ISSUES CONNECTED WITH EMPLOYMENT SEPARATION/SETTLEMENT AGREEMENTS?

The tax characterization of severance and settlement payments can significantly affect the dynamics of negotiating settlement and separation agreements. What follows is a summary of the highlights of the current tax consequences of payments under a separation or settlement agreement. In any particular situation, the advice of counsel should be obtained, as the proper tax treatment of these payments is far from settled.

A. Income Tax

Salary continuation and other severance payments, as well as back pay, are taxable as wages for federal and state income tax and social security (FICA) tax purposes when the payments are received, and withholding obligations will apply in some form.

B. Exclusion for Payments Received "On Account of Personal Injury or Sickness"

1. Prior Law

Prior to August of 1996, damages or settlements received (whether by suit or agreement, and whether as lump sums or as periodic payments) "on account of personal injury or sickness" were excluded from a taxpayer's gross income under Internal Revenue Code ("IRC") section 104(a)(2). Interpreting this section, the courts generally held that damages received on claims for emotional distress, defamation and other tort actions were excludable from gross income. As for the taxability of damages received on statutory discrimination claims, such as the ADEA or Title VII, the law was not entirely settled – each case largely turned on whether the court found that the statutory discrimination action at issue was based on "tort or tort type rights." *See, e.g.*, *Commissioner of Internal Revenue v. Schleier*, 515 U.S. 323 (1995) (holding that ADEA award was not the result of a personal injury and therefore was subject to income tax).

As a result, under the prior law, parties to a separation or settlement agreement in an employment action often structured their agreement so that the damages payment would not be subject to federal tax (by, for example, characterizing the majority or all of the payment as settlement of an emotional distress claim).

2. Current Law

The "Small Business Job Protection Act of 1996 " effective August 20, 1996, amended IRC section 104(a)(2) by providing that the exclusion from income tax applies only to damages received on account of a personal *physical injury* or *physical sickness*. Pub. L. 104-188 § 1605, 110 Stat. 1755 (1996).

a. Emotional Distress Damages

The law specifically states that emotional distress is not considered a physical injury or physical sickness, and, consequently, damages received on emotional distress claims are now taxable (although reimbursement for medical care attributable to emotional distress would be excludable from gross income). *Id.*

b. Punitive Damages

The Act now makes clear that all punitive damages (except for those awarded in certain wrongful death actions) are taxable, regardless of whether or not they are related to a claim of personal physical injury or physical sickness. *Id*; *see also O'Gilvie v. United States*, 519 U.S. 79 (1996) (holding that punitive damages are not awarded "on account of personal injuries or sickness" and therefore constitute gross income).

c. Back Pay

At one time, employees could exclude from gross income amounts awarded to them as back pay. However, two decisions from the U.S. Supreme Court have held back pay is not excludable. *See United States v. Burke*, 504 U.S. 229, 241(1992) (holding that back pay awards in settlement of Title VII claims are not excludable from gross income); *see also Commissioner of Internal Revenue v. Schleier*, 515 U.S. 323 (1995) (back pay and liquidated damages received in settlement of an ADEA claim are not excludable because neither are received "on account of personal injuries or sickness."). Ultimately, section 104(a)(2) was amended to reflect this decision.

d. General Effect of Small Business Job Protection Act

The effect of the tax law changes, particularly with regard to emotional distress damages is, of course, that settlement dollars no longer go as far. Since the overwhelming majority of employment cases do not involve claims of physical injury or physical sickness, most settlement payments are fully taxable for the plaintiff. Without the favorable tax treatment of the past, plaintiffs most likely will be demanding more money to settle their cases. In light of this, it is increasingly important for employers to explore all non-monetary ways to compensate or otherwise benefit their employee-plaintiffs.

3. State Statutes

Many state anti-discrimination statutes provide for a broad range of remedies, which include compensatory damages. *See, e.g.*, N.Y. Human Rights Law § 296a.7-10(2) (authorizing the award of compensatory damages). Thus, it appears that the tax consequences for awards or settlements under these statutes would be analogous to the tax consequences of awards or settlements under Title VII as amended by the Civil Rights Act of 1991.

C. Specific Allocation When Multiple Claims Are Alleged

Quite often separation and settlement agreements encompass the employee's release of more than one claim. In light of the recent tax law changes discussed above, the allocation of a settlement payment among a plaintiff's claims in an employment case will not usually be of critical importance. The presence of multiple claims may provide the plaintiff some latitude to allocate the settlement on a tax-favored basis, however, if a claim alleging physical injury or physical sickness is present. In these cases if the allocation is reasonable, it likely will be upheld. *See McKay v. Commissioner of Internal Revenue*, 102 T.C. 465 (1994) (upholding parties' settlement allocation where settlement was reached as result of *bona fide*, arm's-length negotiations in adversarial setting), vacated on other grounds in unpublished decision, 84 F.3d 433 (5th Cir. 1996); *but see Bagley v. Commissioner of Internal Revenue*, 105 T.C. 396 (1995) (refusing to honor settlement which was not adversarial because neither party wanted to characterize amounts as punitive despite inherent punitive element); *see also Robinson v. Commissioner of Internal Revenue*, 102 T.C. 116 (1994), *rev'd in part on different grounds*, 70 F.3d 34 (5th Cir. 1995) (rejecting state trial judge's approval of allocation of damages in final judgment and allocating damages instead according to the jury's original percentages).

The Second Circuit has held that where a general separation agreement failed to allocate the portion of the settlement payment excludable from income, *all* compensation received under the agreement was taxable. *Taggi v. U.S.*, 35 F.3d 93 (2d Cir. 1994). The court explained that "since the release was all-encompassing, including both contract and tort claims, the [district] court was not in a position to apportion the payment among the various possible claims." *Id.* at 96.

Because there may be some uncertainty over the IRS's treatment of allocation in any particular case, any separation agreement should include: (a) an agreement that any taxes, interest, and penalties that may later be imposed by the IRS or court of competent jurisdiction are the employee's sole responsibility; and (b) an agreement by the employee to indemnify the employer against and hold it harmless from any such assessments.

D. Attorneys' Fees Awards

Employees (or their counsel) frequently request that a portion of the settlement sum be attributed to attorneys' fees. If the attorneys' fees are attributable to an exempt award (*i.e.*, a personal physical injury award), the amount of attorneys' fees would not be deductible by the employee on his or her tax return. However, to the extent that attorneys' fees are attributable to a taxable award, the fees would be deductible by the employee.

E. Withholding

Under federal law and the law of many states, every employer making payment of wages for services performed shall deduct and withhold income and social security taxes. *See* IRC § 3402(a)(1); Cal. Rev. & Tax. Code §§ 18805, 18806; N.Y. Tax Law § 671. Under the federal withholding statute, "wages" means "all remuneration for services performed by an employee for his employer." IRC § 3401(a). This means that the employer must withhold on the portion of a settlement payment attributable to a back pay claim.

Several courts, including the California Court of Appeals, have held that payment in satisfaction of a judgment in favor of a plaintiff and against an employer for breach of employment contract is not subject to withholding for federal and state income taxes and social security taxes. *Lisec v. United Airlines, Inc.*, 10 Cal. App. 4th 1500 (Cal. Ct. App. 1992), *review denied*, No. S029223, 1992 Cal LEXIS 5753 (Nov. 18, 1992). The court reasoned that even though such an award is measured by lost wages and is normally taxable, when it is paid in satisfaction of a judgment obtained after the employment relationship has been terminated, then it is not subject to withholding. *See also Kelly v. Hunton & Williams*, No. 97-CV-5631, 1999 U.S. Dist. LEXIS 14605, *5 (E.D. N.Y. Sept. 21, 1999) (to the extent settlement represents lost wages, it relates to time when employment relationship was terminated and therefore does not constitute wages subject to withholding); *Wilson v. AM General Corp.*, No. 3:95-CV125RM, 1999 U.S. Dist. LEXIS 21828, *8 (N.D. Ind. Sept. 9, 1999) (same); *Churchill v. Star Enters.*, 3 F. Supp. 2d 622, 624-25 (E.D. Pa. 1998) (rejecting Internal Revenue Service Regulations, which

instructed that back pay awards to former employees on account of discrimination should be included as "wages" for withholding purposes, as contradictory to express statutory language).

An employer faced with the question of whether to withhold in any particular case should consult with counsel or a tax advisor for guidance.

F. Form 1099s

There remains considerable confusion in connection with the use of Form 1099s with respect to settlement proceeds. Uncertainty exists over how many Form 1099s to issue, for whom, and in what amount. Even where the requirements for withholding are not met, it may be necessary for the employer to file a Form 1099 if the payment is included in the employee's income (*e.g.*, a payment allocated to attorneys' fees). However, where the payment is properly considered an exempt personal physical injury award, and therefore not included in the employee's income under IRC section 104(a)(2), then no Form 1099 need be filed.

The Ninth Circuit Court of Appeals has held that under federal tax laws, a recovery of attorneys' fees (either through judgment or settlement), whether paid directly to the attorney or to the plaintiff is part of *plaintiff's* taxable gross income. *Benci-Woodward v. Commissioner of Internal Revenue*, 219 F.3d 941 (9th Cir. 2000).

Under *Benci-Woodward*, an employer should issue a Form 1099 to the plaintiff for the total amount of the settlement, including attorneys' fees. If the plaintiff insists that the fees portion of the award be paid directly to the attorney, the employer should issue two Form 1099s: one to the plaintiff (for the entire amount of the settlement) and one to plaintiff's attorney (for the attorneys' fees portion of the settlement).

The United States Tax Court has followed *Benci-Woodward* in at least two decisions, holding that a judgment for breach of contract, including the portion attributable to attorneys' fees, is includable as gross income. *See Freeman v. Commissioner of Internal Revenue*, T.C. Memo 2001-254 (2001); *see also Kenseth v. Commissioner of Internal Revenue*, 114 T.C. 399 (2000) (attorneys' fees not excludable from gross income).

In *Commissioner of Internal Revenue v. Banks*, 543 U.S. 426, 430 (2005), the Supreme Court recently held that, "as a general rule, when a litigant's recovery constitutes income, the litigant's income includes the portion of the recovery paid to the attorney as a contingent fee," resolving an issue that previously divided the courts of appeal. The Court reversed the Sixth Circuit Court of Appeals decision in *Banks v. Commissioner of Internal Revenue*, 345 F.3d 373 (6th Cir. 2003), which held that "the contingent-fee portion of a litigation recovery is not included in the plaintiff's gross income." 543 U.S. at 429. It also reversed the Ninth Circuit Court of Appeals decision in *Banaitis v. Commissioner of Internal Revenue*, 340 F.3d 1074 (9th Cir. 2003), which held that "the portion of the recovery paid to the attorney as a contingent fee is excluded from the plaintiff's gross income if state law gives the plaintiff's attorney a special property interest in the fee, but not otherwise." *Id.* The Court concluded that a contingent-fee agreement should be viewed as an anticipatory assignment to the attorney of a portion of the

client's income from any litigation recovery. *Id.* at 434. It emphasized the fact that the attorney-client relationship is a principal-agent relationship and that the plaintiff (and not his attorney) retains dominion over the income-generating asset, the cause of action, throughout the litigation. *Id.* The Court further concluded that attorneys' fees are a part of plaintiff's income "whether or not the attorney-client contract or state law confers any special rights or protections on the attorney, so long as these protections do not alter the fundamental principal-agent character of the relationship." *Id.* at 437.

In *Murphy v. Internal Revenue Service*, 460 F.3d 79 (D.C. Cir. 2006), the District of Columbia Circuit Court of Appeals held that compensation for personal injury, compensation which is unrelated to lost wages or earnings, does not constitute taxable income within the meaning of the 16th Amendment and, on these grounds, invalidated section 104(a)(2) of the Internal Revenue Code to the extent that it permitted such taxation.

In 2004, Congress enacted the American Job Creation Act ("the Act"). Section 703 of the Act amended the Internal Revenue Code to allow a taxpayer, in computing adjusted gross income, to deduct attorneys' fees and court costs paid by, or on behalf of, the taxpayers in connection with any action involving a claim of unlawful discrimination. *See* 26 U.S.C. § 62 (a)(20) (2006).

The Internal Revenue guidance seems to indicate that whenever a payment is made for attorneys' fees (even if it is a portion of an award and the amount designated for such fees is unclear), that a Form 1099 should still be issued to the plaintiff. As a practical matter, the guidance would seem to require the issuance of two Form 1099s: one to plaintiff for the entire amount of the settlement – in which instance the plaintiff would deduct the attorneys' fees pursuant to the American Job Creation Act – and one to the plaintiff's attorney for the attorneys' fees portion of the award.

V. WHAT ARE EFFECTIVE TECHNIQUES IN NEGOTIATING AN EMPLOYMENT SEPARATION OR SETTLEMENT AGREEMENT?

A. With Regard to Separation Agreements, Generally, Let the Employee Raise the Issue of a Claim Against the Employer

1. Conduct an exit interview when an employee is terminated and invite the employee to speak freely.

2. From the substance of this interview and a review of the surrounding circumstances, gauge whether (a) the employee is asserting a claim and (b) the employer faces possible exposure. *Consultation with an attorney can be essential to make this evaluation.*

3. If you are interested in "buying peace" from the employee, indicate that you are willing to enter into a comprehensive separation agreement,

probably best characterized initially as "a means for us to part ways amicably and without any future disputes."

4. If the employee expresses an interest in an amicable separation with some type of enhancement, then present (or prepare) an appropriate agreement.

5. Be prepared to negotiate. In individual terminations, the employee almost always seeks to negotiate the consideration and the terms of the agreement. Beware of using the last "form" that was heavily negotiated since negotiations always begin from what you offer in the first draft of the agreement. Moreover, the fact that the agreement was negotiated will help if challenges to its enforceability are thereafter made.

6. Draft the agreement in as simple and comprehensible language as possible.

7. If a waiver of an ADEA claim is sought, comply with all OWBPA requirements.

8. Even if the OWBPA requirements do not apply, allow the employee a reasonable period of time to think over the matter, taking the proposed agreement with him if desired, and afford the employee the opportunity to consult counsel of his choice.

B. Necessary Terms in a Separation/Settlement Agreement:

1. For separation agreements in particular, a statement of the last date of employment, the last date on active payroll, and the last day of company provided benefits eligibility;

2. an acknowledgment by the employee that he or she has received all wages, bonuses, vacation pay and other benefits and compensation due the employee by virtue of his or her employment;

3. acknowledgment of payment by the employer of consideration to which the employee is not otherwise entitled;

4. the employee's general release of all claims, known and unknown, that the employee has or could have against the employer, including but not limited to specified statutory employment claims as well as a promise not to file any claims in the future arising out of the employment relationship (and for California cases, a specific waiver of California Civil Code § 1542 – *see* discussion *supra* "State Law Claims" Part IV (B);

5. that it is a compromise and in full settlement of disputed claims between the parties;

6. a statement that the employee is responsible for his/her own attorneys' fees and costs;

7. a statement that none of the benefits being given to the employee have been assigned or are not subject to alienation (*i.e.*, personal bankruptcy);

8. an acknowledgment by the employee that he or she understands the agreement fully, has had sufficient opportunity to review it (21- or 45-days in the case of ADEA claims) with counsel of his or her choice (and has been advised to review it with counsel in the case of ADEA claims), and executes it knowingly and voluntarily;

9. an express denial by the company of the validity of the employee's disputed claims and a statement that nothing contained in the agreement may be used or viewed as an admission of liability;

10. an allocation of the consideration between taxable and non-taxable payments, if appropriate, and the employee's indemnity of the employer against any liability arising from the allocation;

11. an exclusion from the release of benefits in which the employee is vested by contract or law; and

12. the employee's ongoing duty to maintain the employer's trade secrets.

C. Optional Terms:

1. Mutuality of certain provisions such as releases, confidentiality, non-disparagement;[3]

2. the continuation of salary and certain benefits in lieu of a lump sum payment, and what happens in the event of death prior to payment of all salary continuation;

3. outplacement counseling;

[3] Blogging has become so prevalent that some attorneys believe that clauses barring blogging may become common facets of disparagement terms. *See* Tom Gilroy, *EEOC Opposes Settlement Clauses That Bar Re-Application and Rehiring*, BNA DAILY LABOR REPORT, Apr. 4, 2008, at C1 (quoting James Zalewski, an attorney, who says that "statements made on blogs can lead to defamation lawsuits" and that "[s]o pervasive has the blogosphere become, in fact, that 'no blogging' clauses have begun to appear in employment contracts").

4. the employee's agreement not to apply for reemployment and waiver of any rights to be recalled to employment in the future;[4]

5. maintenance of the confidentiality of the agreement and the details of the separation by both the employee and his or her attorney;

6. how the employer will respond if the employee files for unemployment insurance;

7. a statement that any ambiguity in the agreement will not be construed presumptively against any party;

8. no-solicitation or non-compete provision, where and to the extent lawful;[5]

9. the purging of objectionable materials from the employee's personnel file;

10. an agreed-upon (but truthful!) letter of recommendation or some other limitation on future references;

11. a provision requiring the employee to cooperate in connection with any investigation, regulatory matter, lawsuit or arbitration in which the employee has pertinent information and whether or not the employee will be reimbursed for expenses or otherwise compensated;

12. at the employer's option, return of the consideration or payment of liquidated damages if the employee breaches any provision in the agreement;

13. arbitration of any future disputes concerning the agreement;

14. an award of attorneys' fees to the prevailing party in any action to challenge, enforce or interpret the separation agreement (this must be mutual);

[4] The EEOC opposes any term in a separation agreement that denies the employee of an opportunity to reapply for a job with that employer. *See* Tom Gilroy, *EEOC Opposes Settlement Clauses That Bar Re-Application and Rehiring*, BNA DAILY LABOR REPORT, Apr. 4, 2008, at C1 (stating that "the agency opposes as a matter of policy both 'no-hire' and 'no-re-apply' covenants" as such clauses "are not good public policy, since they could be viewed almost as retaliation for coming forward for a discrimination claim").

[5] In California, non-competition agreements are generally unenforceable. *See Edwards v. Arthur Andersen*, 142 Cal. App. 4th 603 (Cal. Ct. App. 2006) (concluding that a non-competition agreement is invalid under Business and Professions Code section 16600, unless it falls within the statutory or "trade secrets" exceptions to the statute, even if the restraints imposed are narrow and leave a substantial portion of the market open to the employee), *vacated by grant of review*, 52 Cal. Rptr 3d 86 (2006).

15. if a lawsuit or an administrative charge has already been filed, a stipulation of dismissal or withdrawal with prejudice should be appended to the separation agreement;

16. a provision prohibiting the employee from encouraging or co-operating in the prosecution of actions by other employees, unless required to do so by legal process or other requirement and requiring notice when such process is served on the employee;

17. execution by the employee's attorney, if any; and

18. customary legal requisites (*e.g.*, notice provisions, integration, severability, governing law, execution in counterparts).

D. Must the Agreement Be Drawn Up in a Formal, Lengthy Agreement?

No. Especially in the case where the employee has not retained counsel, oftentimes a letter agreement, which is equally valid, will make the process less imposing and decrease the prospect that there will be any issues enforcing the agreement.

VI. CONCLUSION

A separation agreement or release can be an effective way for an employer to "buy peace" from a former employee. However, to gain the full benefit of a separation agreement and to finally lay to rest all issues between the employee and employer, an employer must carefully tailor these agreements to the particular circumstances surrounding the employee's separation with full knowledge of the host of legal issues that surround the creation and enforcement of these agreements.

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