

# Creating Severance Agreements That Protect Your Organization



Presented to HR Café on September 5, 2018

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# Severance Pay – Should You Do It?

- Employer policy
- Employer practice
- What is the reason for the employee's separation?
- Is there any reasonable potential exposure to legal liability?
- How likely is it that this employee would pursue legal claims?

# Severance Pay – Should You Ever Pay Without Getting a Release of Claims?

**NO.**

- There can be exceptions, but don't make it a company policy or practice

# Disadvantages

- Requirement of signing a legal document raises suspicions
  - May cause employees to think they have legal claims
  - May cause employees to seek counsel
- Offering “additional consideration” – money that you are not legally obligated to pay -- may be expensive
- Preparation of documents can cost attorneys’ fees

# Advantages

- Limits the money that you pay for avoiding the risk presented by legal claims
- Addresses and closes open questions, such as return of property; confidentiality; non-disclosure and non-solicitation obligations
- Avoids litigation
- Minimizes attorneys' fees
- **YOU HAVE BOUGHT YOUR PEACE!** You get an enforceable release of claims that – if done right – legally prohibits the employee from making legal claims against you

*Time for...*

***AUDIENCE PARTICIPATION!!***

# Severance Agreement: A Good Thing

***Separation agreements can be a very effective risk-management tool, so they are very much worth doing correctly to ensure that the employee's release of legal claims is enforceable.***

# Essential Elements of a Release Agreement

- “Knowing and voluntary” signing of agreement
- Adequate consideration
- Specific description of released claims
  - “Clearly identify the released claims (some kinds of claims cannot be released)



# When is a signing “knowing”?

- Clear and understandable language
- Appropriate information is available to the employee
  - e.g., certain information must be given when the release is part of an “employment termination program” under federal law

# When is a signing “voluntary”?

- No coercion or intimidation
- No threat to withhold wages already due
- Reasonable amount of time to consider whether to sign agreement (specific minimum required by certain cases)
- Right to rescind is required by some laws
- Opportunity to seek counsel is required by some laws

# Essential Elements of a Release Agreement

*The essential components are critical, but every aspect of the agreement should be done with an eye toward making the document easy for the employee to read and understand.*



# And now a short break for...The Presenter's Soapbox

## ***USE PLAIN ENGLISH!!!***

- Avoid legalese:

Therein	Subsequent to	Hereafter
Herein	Said	Thereafter
Heretofore	Aforementioned	Hereby
Wherefore	Thereby	Hereinbefore

- Avoid long, complex sentences
- Avoid he/she, him/her

# Opening Paragraph

- “This Confidential Separation and Release Agreement (“Agreement”) ....”
- Identify the parties:
  - Acme Co. -- “Acme” or “the Company” or “the Employer”
  - Wile E. Coyote – “Coyote” or “the Employee” or “Wile”



# Recitals

- Some basic information to put the agreement in context
  - Coyote has worked for Acme since February 2011 as a Troublemaker.
  - Coyote's employment will end on January 31, 2019 [Or: Coyote is resigning from his employment effective January 31, 2019]
- The parties want to enter into an agreement regarding the end of their employment relationship and to resolve all issues relating to Acme's employment of Coyote.

# End of Employment; Final Pay

- State the last date of employment
- State that Acme will pay all wages and vacation/PTO owed to Coyote on that last day of work
- If applicable, consider stating that Acme will convert medical and dental coverage to COBRA as required by law, so long as Coyote completes the requirements for that to happen

# Consideration to the Employee

- “In full consideration of Coyote’s execution of this Agreement, Acme will provide him with the following severance benefits:”
- Options:
  - Pay Coyote money that he is not legally entitled to receive [*How much?*]
  - Agree not to oppose his claim for unemployment benefits
  - Give help in finding a new job
  - Give a positive reference
  - Pay COBRA premiums for a defined period of time



# Release of Claims

“In consideration for the payments and other benefits described above, and as a material inducement to Acme to enter into this Agreement, Coyote unconditionally, irrevocably, and absolutely releases and discharges ....”

- Releases who?
- Releases what?

# Releases Who?

- Acme
- Employees, officers, directors, shareholders
- Volunteers?
- Affiliated companies, parents, subsidiaries
- Successors
- Insurers
- Attorneys
- These are all the “Released Parties”

# Releases What?

“... from all claims related in any way to the transactions and occurrences between them to date that arise out of Coyote's employment by Acme and the end of that employment. This release is intended to have the broadest possible application and includes, but is not limited to, ....”

# Releases What?

Claims for:

- Breach of contract
- Wrongful termination
- Violations of state law (specify main ones)
- Violations of federal law (specify main ones)
- Infliction of emotional distress

# Claims That CANNOT Be Released

“The release does not encompass claims for unemployment insurance benefits. In addition, this release does not apply to claims arising under the workers’ compensation laws, except claims for wrongful termination, discrimination, or retaliation under those laws. Also, the release does not include claims for violation of the Fair Labor Standards Act.”

So, what can you do about these?

# Claims That CANNOT Be Released

Require the employee to acknowledge certain facts in the agreement:

Coyote acknowledges the following facts as true: (1) He does not have a work-related injury and (2) he has received all wages that Acme owes him.

# PROMISE NOT TO PROSECUTE/WARRANTY OF NO PENDING ACTION

- Employee has not contacted a government agency to report alleged violations or initiate a claim
- Employee promises not to do those things
- Employee promises not to prosecute any claim in any court or agency relating to any of the released matters
- Employee may file claims with the EEOC or the DFEH, but agrees that he may not recover damages based on those charges

(Note: You may not prohibit employee from participating in EEOC/DFEH investigation or proceeding.)

# WAIVER OF CALIFORNIA CIVIL CODE SECTION 1542

- This statute says that a general release does not include a release of claims that the releasing person does not know about or suspects that the claims exist
- By waiving his rights under the statute, the employee agrees that his release encompasses all potential claims existing at the time of the release, even if he does not know about them.
- **Must set forth the exact language of the statute**



# SPECIAL REQUIREMENTS FOR RELEASE OF CLAIMS UNDER THE ADEA

- Must specifically release ADEA claims
- Must comply with specific time lines
- At least 21 days for an individual to consider the release (more for groups)
- Right to revoke within 7 days (*more on these time frames later*)
- Must advise the employee in writing of the right to seek counsel

# SPECIAL REQUIREMENTS FOR RELEASE OF CLAIMS UNDER THE ADEA

Releases as part of an “employment termination program” require:

- 45 days to consider the release;
- 7-day revocation period;
- Information about:
  - The specific job categories affected
  - The ages of employees in each category selected/eligible
  - The ages of employees in each category not selected/eligible
- Identification of the “decisional unit”
- Explanation of the criteria for selection

# ADDITIONAL TERMS

- Coyote's cooperation
  - Winding up work
  - Transitioning to replacement
  - Assisting with litigation
- Return of company property
- References – follow company policy

# ADDITIONAL TERMS

- Non-disparagement
  - If Coyotes asks for this to be mutual, be careful
  - Acme can't control all of its officers and employees for all time (depending on size)
  - Acme should only agree to instruct certain key individuals not to disparage Coyote (I'm looking at you, Roadrunner)
  - Maintain documents to show that Acme did that
- No rehire

# ADDITIONAL TERMS

- Confidentiality

- Coyote can tell spouse, tax advisor, legal advisor
- He cannot tell other Acme employees, current or former
- Acme can tell employees with business-related reason to know; accountants; attorneys; insurance brokers; others?



# ADDITIONAL TERMS

## Non-disclosure and non-solicitation covenants

- If Coyote previously signed an agreement with these provisions, have him reaffirm them in the severance agreement
- If no previous signed covenants, and you really want them, you may need to pay more in severance

# ADDITIONAL TERMS

- Choice of law; venue
- Changes must be in writing signed by parties
- No admission of liability by the Employer
- Severability
- Attorneys' fees clause
  - Prevailing party gets fees if it must sue for breach or to enforce agreement
- Agreement may be executed in counterparts
- Valid signatures include fax and emailed .pdf

# TIME FOR CONSIDERATION OF AGREEMENT

If the employee is 40 years or older, and you want a release of an age discrimination claim under the ADEA, the Older Workers Benefits Protection Act requires that the employee receive 21 days to consider the agreement and 7 days to revoke it



# TIME FOR CONSIDERATION OF AGREEMENT

This provision is intended to comply with the Older Workers Benefits Protection Act. Employee acknowledges that:

- (a) Employee has been advised to consult with an attorney before signing this Agreement, which contains a general release;
- (b) Employee has been advised that he has 21 days, from the date of the presentation to him of this Agreement, in which to consider whether he should sign this Agreement;
- (c) Employee understands that this Agreement contains, among other things, a release of claims under the Age Discrimination in Employment Act of 1967, meaning that Employee would be giving up any claims about being discriminated against because of his age; and
- (d) Employee has been advised that, if he signs this Agreement, he will be given seven days following the date of signing in order to revoke the Agreement. The revocation shall be made in a writing signed by Employee, and hand-delivered, faxed, or e-mailed to \_\_\_\_\_ of the Company. (If the seventh day falls on a weekend or holiday, then the written revocation must be received by the Company on the next business day following such weekend or holiday.) This Agreement will become effective on the eighth day after it is signed by Employee, if not revoked.

# TIME FOR CONSIDERATION OF AGREEMENT

- If the employee is under 40, you should still give some time for consideration, and maybe revocation
- Requiring the employee to sign “on the spot” may lead to a claim that agreement is unenforceable because it was signed under duress/coercion
- Consider giving 5 to 7 days for the employee to review and consider the agreement, and have a short period for him to revoke – perhaps 2 or 3 days

# FINAL LANGUAGE BEFORE SIGNATURES

BY SIGNING BELOW, EMPLOYEE REPRESENTS THAT (1) HE HAS CAREFULLY READ AND CONSIDERED THIS AGREEMENT; (2) HE HAS BEEN GIVEN SUFFICIENT TIME TO CONSIDER WHETHER TO SIGN IT; (3) HE UNDERSTANDS THAT THE AGREEMENT CONTAINS A FULL RELEASE OF ALL CLAIMS OF EVERY KIND AGAINST THE COMPANY; AND (4) HE VOLUNTARILY CONSENTS TO THE TERMS OF THE AGREEMENT WITH FULL UNDERSTANDING OF THEIR MEANING.

# TRAPS FOR THE UNWARY

- Employee's level of comprehension
- No translation into employee's primary language
- Legal jargon
- Inadequate consideration
- Thoughtless "boilerplate" provisions

# PRACTICAL ADVICE

- *DO NOT PAY THE SEVERANCE UNTIL YOU HAVE THE SIGNED AGREEMENT!*
- Consider the unique circumstances of each situation
- Beware of reliance on “form” or “old” releases
- Involve your legal counsel as appropriate
- Treatment of separated employees will be monitored by retained employees

# Final Questions



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