
Employment Law Planning Series

EMPLOYEE SEPARATION AGREEMENTS - PROTECTING YOUR INTERESTS

Companies frequently need to make decisions to cut back their workforces and terminate employees. This situation is even more prevalent in a faltering economy. In facing this prospect, you should have a comprehensive separation agreement and general release that covers all the risks that you face when terminating an employee.

The following are key terms that employers large and small should consider in their separation agreements:

- ***Make sure the release is comprehensive.*** State employment laws vary, and you should be sure the agreement identifies the specific laws in the state where the employee performs services. Courts in New Jersey have held that an agreement that did not identify the specific statutes released did not provide the employee with notice of the claims he was releasing, and therefore the employee could be free to sue for claims not identified in the agreement.
- ***Payments and tax.*** Separation agreements should clearly state the timing of separation payments and the withholding and payment of taxes. From the employer's standpoint, the preferred method to pay severance is through the normal payroll process over several weeks or months, with taxes and deductions withheld. This method is generally favored by the IRS and protects the employer from tax collection claims. If no taxes are withheld, and the employer pays the settlement in a lump sum (as many employees prefer), the employer may be liable for taxes the employee fails to pay.
- ***"Older" Workers.*** If an employee is 40 years of age or older, then federal law requires specific language, waiting periods, revocation periods and waivers for a valid release of a claim for age discrimination. In addition, if the separation package is part of a group termination program, the ages and positions of employees in the relevant unit who were selected or not selected for termination typically need to be disclosed. Strict compliance with these provisions is important for a release to be valid.
- ***Non-disparagement.*** Employers should ensure that any employee who is paid separation pay agrees not to disparage the employer or its management, or cast them in a negative light. Although these covenants are difficult to monitor and enforce, when coupled with a "clawback", they act as a valuable preventive mechanism, which can be useful in preventing any disparagement.

- **Confidentiality.** Employees should be required to keep the existence of the separation agreement and its terms confidential as well as affirm their obligations to keep secret the company's confidential business information, and not retain, use or disclose such information after their employment ends.
- **Non-compete agreements.** If an employee has signed a non-compete or non-solicitation agreement, the obligations of such agreement should be confirmed in the separation agreement. The separation agreement also offers the opportunity to include a carefully crafted non-compete and non-solicitation agreement when one was not already in existence, which provides restrictions on an employee's actions regarding customers and other employees during critical times immediately after employment is terminated.
- **Venue and choice of law.** Employers have the ability to designate their "homecourt" where any dispute relating to the separation agreement will be held. The separation agreement can also have arbitration be the exclusive manner to resolve disputes involving the separation agreement.

These are just some of the key terms that should be considered and drafted, as appropriate, for every separation agreement. The employer generally can decide what provisions to include, and how simple or complex to make the agreement.

If you are contemplating terminating of an employee, it is important to use a carefully crafted separation agreement and general release to protect your business and avoid litigation.



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