

## Severance Agreement Considerations

### Factors to Consider:

- What consideration is being provided to the employee in exchange for releasing all claims?
- What parties should be included in the release to ensure that the employer, and all of its agents, successors, insurance carriers and all other interested entities are released from claims?
- What claim(s) is the employee releasing in relation to his/her employment and termination?
- What potential claims should be listed that are unknown at the time of separation?
- Has the employee agreed to release claims related to attorney's fees and expenses?
- How are the employee's benefits affected and does the release apply to such benefits?

### Provisions that may be included:

- A recital of the ending of the employment relationship by mutual agreement.
- A statement of the effective date of the agreement or the employee's resignation.
- A release of claims against the company. Special waiver and disclosure language is required for release of federal age claims.
- Nonadmission language.
- A statement of any severance payment, salary continuation, and/or other payments or benefits to be paid to the employee.
- A statement as to the tax treatment of the payments made and whether subject to withholding (W-2) or 1099 reporting.
- A confidentiality clause protecting information contained in the severance agreement and the employer's confidential and proprietary information.
- A non-disparagement clause.
- A clause describing how job references are to be handled for the employee after he/she has left the company.
- A full disclosure – voluntary participation clause.
- A clause requiring return of all company property.
- A clause indicating whether the severance agreement may be assigned to anyone else.
- A clause indicating whether any payments or other benefits inure to the benefit of and are binding upon the employee's heirs and personal representatives.
- Noncompetition/nonsolicitation agreement.
- A clause indicating which state's law will be used in the interpretation of the agreement and requiring any lawsuit arising out of the agreement to be filed in a forum selected by the employer.
- Arbitration to resolve disputes over the agreement.

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OWBPA Requirements:

In addition, waivers pertaining to employees forty years of age or older require additional attention because the Older Workers Benefit Protection Act (OWBPA) sets forth strict guidelines for written waivers of age discrimination claims.

- The waiver should be written in clear and unambiguous language, “calculated to be understood” by the employee;
- The waiver should specifically refer to rights or claims arising under the Age Discrimination in Employment Act (ADEA);
- The waiver should not include a waiver of ADEA rights or claims which arise after the date the waiver is executed;
- The employee should be given something in exchange for signing the waiver;
- The employee should be advised in writing to consult with a lawyer before signing the agreement;
- The employee should be given at least 21 days to consider the waiver before signing it;
- If the employee is part of a group being offered an early retirement incentive or other employment termination program, the employee should be provided 45 days to consider the matter before signing;
- The employee should be given 7 days to revoke the agreement after signing it and the agreement should not become effective until after the 7 days have passed; and
- In group offerings or programs, prior to execution, the employee should be informed in writing about
  - the class, unit or group covered by the program;
  - any eligibility factors for the program;
  - any applicable time limits;
  - titles and ages of all individuals eligible for the program; and
  - age of individuals in the same job classification or organizational unit who are not eligible for the selected program.

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