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# AGREEMENTS TO RELEASE CLAIMS – WHAT PROTECTION ARE YOU *REALLY* BUYING?

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When a dispute arises between an employer and their former employee, or when an employer is terminating an employee, they may enter into an agreement whereby the employee receives some consideration in exchange for a full release of all claims. But, how much protection and peace of mind is the employer really buying? Releases may not provide all the protection you think!

Most claims can be released by a friendly letter containing very simple language such as "in exchange for [whatever the consideration is], the employee agrees to fully and completely release [the employer and its employees and agents] from all known and unknown claims to date." Generally, only claims "to date" can be waived, and not future claims and, of course, the agreement must be given knowingly, voluntarily and uncoerced. And, generally speaking, the agreement must be signed by the employee, although an unsigned agreement may be enforced if the employee accepts the consideration tendered along with the release terms. However, in order to enforce a release of some claims, specific language must be included.

For example, to release federal age discrimination claims, the agreement must provide all of the protections required under the Older Worker Benefit Protection Act. Specifically, it must clearly advise the employee that they are releasing such claims, give the employee 21 days to think about the agreement before signing it and seven days to revoke the agreement after it is signed and, further, suggest that the employee seek legal counsel before entering the agreement. When the agreement is being offered to a group of employees, there are additional and different requirements to make the agreement enforceable. Obviously, there are times when, strategically, a warm, friendly, less formal release should be utilized.

Even when a formal release agreement is used, some claims cannot be released. For example, under Michigan law, an employee cannot give an effective release of unemployment benefits, because only the unemployment agency can determine eligibility, or workers' disability compensation benefits, unless a claim has been asserted and it is redeemed at the bureau. However, language can be added to a separation/release agreement that will make it more difficult for the employee to prevail if a claim is brought in the future. For example, the employee can be "permitted" to submit a written voluntarily resignation, which can help to defeat a claim for unemployment benefits. Similarly, an agreement could contain an acknowledgement by the employee that he/she did not suffer any work related injury during their employment, and he/she is currently unaware of any work related illness, thus making a workers' disability compensation claim less likely to succeed. The bottom line is that these claims simply cannot be effectively released through a private agreement.

It is now also fairly clear that an employee cannot give an effective agreement prohibiting him/her from filing a charge with the Michigan Department of Civil Rights or the Equal Employment Opportunity Commission. In fact, the Sixth Circuit Court of Appeals, which has appellate jurisdiction over federal claims filed in Michigan, recently held that such an agreement in and of itself may have violated federal law if the employer had actually attempted to enforce its terms. *EEOC v SunDance Rehabilitation Corp,* 466 F3d 490 (CA 6, 2006). Moreover, any such agreement would not be binding on the state/federal agency charged with enforcing the civil rights laws on behalf of the public. Therefore, even assuming an employee could agree to not file a charge and to not accept any award related to such a charge, government investigators would still have the responsibility to investigate the allegations and take appropriate action if a violation is found.

Complications may also arise with regard to waiving claims under the Fair Labor Standards Act, a federal wage law, and the Family and Medical Leave Act. *See, i.e., Barrentine v Arkansas-Best Freight Sys Inc,* 450 US 728 (1981)*; Dierlam v Wesley Jessen Corp,* 222 F Supp 2d 1052 (ND Ill, 2002). However, the law is not settled in this area for claims brought in Michigan.

In the end, what has the employer bought with the release agreement and how much was it really worth? The answer to this question depends on the particular circumstances and determining how to proceed is extremely strategic. There may be times when an agreement should contain other terms such as a liquidated damages clause, confidentiality agreement, covenant not to sue, or an acknowledgement by the employee that he/she has never been discriminated or retaliated against or has never asserted certain rights. The bottom line is that before deciding whether to offer a release of claims and for how much, and whether to do so by an informal simple letter or a lengthy formal agreement, it is important to seek legal counsel that you trust. If you need further information, please contact the author.

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