

**STRUCTURING SETTLEMENT
AGREEMENTS & RELATED TAX
CONSIDERATIONS
IN EMPLOYMENT CASES**

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I. ENFORCEMENT OF EXECUTED RELEASE. Generally, releases are upheld as valid and will bar existing claims.

A. Knowingly and Voluntarily. The standard in evaluating whether a release is enforceable is whether the employee signed the release knowingly and voluntarily.

1. To be bound by an agreement waiving discrimination and retaliation claims, an employee must have signed the release knowingly and voluntarily with a full understanding of the terms of the agreement. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15, 94 S. Ct. 1011, 1021 n.15, 39 L. Ed. 2d 147, 160 (1974); *see also Paylor v. Hartford Insurance Company*, 748 F.3d 1117 (11th Cir. 2014).
2. Courts look to the totality of circumstances when determining whether a release was executed knowingly and voluntarily. *Paylor v. Hartford Insurance Company*, 748 F.3d 1117 (11th Cir. 2014); *see also Beadle v. City of Tampa*, 42 F.3d 633, 635 (11th

¹ The following material is intended to provide information of a general nature concerning the broad topic of employment law. The materials included in this paper are distributed by the Sass Law Firm as a service to interested individuals. The outlines contained herein are provided for informal use only. This material should not be considered legal advice and should not be used as such. Thank you to Cynthia N. Sass for allowing me to use and adapt her materials on these issues.

Cir. 1995) (stating factors to be considered in determining whether release was voluntary and knowing); *Gormin v. Brown-Forman Corp.*, 963 F.2d 323, 327 (11th Cir. 1992) (same). Several objective factors are reviewed:

- Plaintiff's education and experience;
- Amount of time Plaintiff considered the agreement before signing it;
- The clarity of the agreement;
- Plaintiff's opportunity to consult with an attorney;
- Employer's encouragement or discouragement of consultation with an attorney;
- and
- The consideration given in exchange for the waiver compared with the vested benefits the employee foregoes.

3. Forcing an employee to sign a release in a short time period could void the release.

- For example, in *Puentes v. United Parcel Service*, 86 F.3d 196 (11th Cir. 1996), the court held that Title VII plaintiffs who asserted that they were only given 24 hours to sign a release raised a genuine issue of fact as to whether the release was signed knowingly and voluntarily and therefore defendant was not entitled to summary judgment.
- An exception to the 24-hour rule is where the agreement contains a revocation period allowing the employee to change his or her mind. *See Nero v. Hospital Authority of Wilkes County*, 86 F. Supp. 2d 1214 (S.D. Ga. 1998).
- Another exception to the 24-hour rule is where the employee or former employee was represented by an attorney who settled the matter on behalf of the employee. *Hayes v. National Service Industries*, 196 F.3d 1252 (11th Cir. 1999).

B. FLSA Considerations. Generally, a waiver and release in a severance agreement is not sufficient to waive claims for unpaid overtime and/or minimum wages pursuant to the Fair Labor Standards Act of 1938 (“FLSA”).

1. A release of FLSA claims will be effective if it reflects “a reasonable compromise over issues,” such as FLSA coverage or computation of back wages that are “actually in dispute” to be enforceable. *Lynn’s Food Stores, Inc. v. United States*, 679 F.2d 1350, 1354 (11th Cir. 1982).
2. Further, for the release to be valid, one of three criteria must be met:
 - The settlement negotiations must be supervised by the U.S. Secretary of Labor pursuant to 29 U.S.C. §216(c); or
 - A court reviewed and approved the settlement in a private action for back wages under 29 U.S.C. §216(b); or
 - Where a plaintiff is offered full compensation on the FLSA claim, no compromise exists, thus, there is an argument that there is no need for judicial scrutiny or approval. *MacKenzie v. Kindred Hosp. East, L.L.C.*, 276 F. Supp. 2d 1211, 1217 (M.D. Fla. 2003); *But see Garlobo v. Central Tire Corp.*, No. 12-24504-CIV, 2013 WL 2444870 (S.D. Fla. June 5, 2013) (rejecting *Mackenzie’s* non-judicial oversight of a FLSA settlement where the employee received full relief); *Demosthenes v. Florida Bottling, Inc.*, No. 08–60889–CIV, 2008 WL 4382847, at *1 (S.D. Fla. Sept. 25, 2008) (same).
3. Offering to resolve or tendering unpaid overtime does not moot FLSA claims.
 - *Manley v. RSC Corporation*, 2014 WL 3747695 (M.D. Fla. July 29, 2014) (absent an offer of judgment, offering full relief and/or tendering full relief to an

employee does not moot the employee's claims).

4. General Release/Confidentiality/Non-Disparagement Issues.

- a. General Release. *Moreno v. Regions Bank*, 729 F. Supp. 2d 1346 (M.D. Fla. 2010) (J. Merryday) (prohibiting a general release of all claims to resolve FLSA claims without additional consideration for the general release);
- b. Confidentiality. *Pariente v. CLC Resorts and Developments, Inc.*, 2014 WL 6389756 (M.D. Fla. Nov. 14, 2014) (prohibiting confidentiality provision in FLSA release); *see also Dees v. Hydradry, Inc.*, 706 F. Supp. 2d 1227 (M.D. Fla. 2010); *But see Jarvis v. City of Electric Supply Company*, No. 6:11-cv-1590-Orl-22DAB, 2012 WL 933057 (M.D. Fla. March 5, 2012) (allowing a confidentiality agreement in the settlement agreement).
- c. Non-Disparagement. *Loven v. Occoquan Group Baldwin Park Corp.*, 2014 WL 4639448 (M.D. Fla. Sept. 16, 2014) (striking non-disparagement provision from settlement agreement because it constituted a judicially imposed restraint in violation of the First Amendment).

C. FMLA Considerations. Since the Family and Medical Leave Act of 1993 (“FMLA”) is patterned after the FLSA, there was an argument that employees cannot waive past FMLA claims without approval by a court or through supervision by the U.S. Department of Labor (“DOL”). However, in *Paylor v. Hartford Fire Insurance Company*, 748 F.3d 1117 (11th Cir. 2014), the court of appeals clarified that an employee can legitimately release FMLA claims that concern past employer behavior. Notwithstanding, an employee cannot waive “prospective” FMLA rights (i.e. violations of the statute that have yet to occur at the time of the signing of the release).

D. ERISA Considerations. Be wary of releases that generally waive all of Employee Retirement Income Security Act of 1974 (“ERISA”) claims. ERISA claims, such as short-term disability and long-term disability claims, may be affected by a general release, which may not be intended to be released. The knowing and voluntary standard applies to release of ERISA claims. *Leavitt v. Northwestern Bell Telephone Co.*, 921 F.2d 160, 162 (8th Cir. 1990; see, e.g., *Bacon v. Stiefel Laboratories, Inc.*, 2011 WL 4944122 (S.D. Fla. 2011) (citing *Myricks v. Fed. Reserve Bank*, 480 F.3d 1036 (11th Cir. 2007); *Puentes v. United Parcel Serv. Inc.*, 86 F.3d 196 (11th Cir. 1996)). Most courts will apply the *Beadle* factors to determine whether the waiver was knowingly and voluntarily made. *Bacon*, 2011 WL 4944122.

E. ADEA/Older Worker Considerations.

1. Waiver. Under the Older Workers Benefit Protection Act, 29 U.S.C. §626(f) (“OWBPA”), an employee or former employee cannot waive any right or claim under the Age Discrimination in Employment Act of 1967 (“ADEA”) unless the waiver is knowing, voluntary, and satisfies the following requirements:

- The waiver is part of an agreement between the employee and the employer that is written in a manner that the average person can understand and participate in negotiating the language.
- The waiver specifically refers to rights and claims under the ADEA.
- The waiver does not apply to claims that arise after the date it was executed.
- The waiver is made in exchange for consideration in addition to anything of value to which the employee is already entitled.
- The employee is advised in writing to consult with an attorney prior to executing

the agreement.

- The employee is given a period of 21 days in which to consider the agreement or 45 days if the waiver is requested as a separation incentive offered to a group or class of employees.²
- The employee has at least seven days following execution to revoke.

2. Tender Back Monies. A claimant does not ratify an otherwise unenforceable ADEA release by retaining any settlement monies. In January 1998, the Supreme Court held that employees do not have to tender back monies to challenge the validity of a waiver under the ADEA. In short, retention of severance monies does not amount to a ratification of the release to the ADEA claims. *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422; 118 S. Ct. 838, 139 L. Ed. 2d 849 (1998); *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir. 1992), *cert denied*, 113 S. Ct. 412 (1992).

F. NLRA Considerations. It is important to determine whether the severance agreement contains any provision that prevents or requires an employee to waive pursuing a class action under the National Labor Relations Act of 1935 (“NLRA”), regardless of whether in court or arbitration.

- *See Murphy Oil USA and Sheila M. Hobson*, 361 NLRB No. 72 (October 28, 2014) (holding that requiring the waiver of class claims in any forum constitutes an unfair labor practice and violates the NLRA). *Murphy Oil* is currently pending appeal to the

² Additional requirements apply if the waiver is in connection with a separation agreement or other employment termination offered to a group. For example, if the waiver is applicable to the group, prior to the 21-day consideration period, the employer has to inform the individuals, in writing that is clear and understandable by the average person, of any class, or group covered by the program and eligibility factors, among other things. 29 U.S.C. §626(f). In addition, the employer must provide the “job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.” 29 U.S.C. §626(f)(1)(H)(ii). A waiver of any charge filed with the EEOC may not be waived unless the first five requirements have been met, and in any case no waiver agreement can affect the EEOC’s rights to enforce the ADEA.

Fifth Circuit Court of Appeals and is scheduled for oral argument on August 31, 2015. *See* Agency No. 10-CA-038804, Case No. 14-60800.

- Notably, *Murphy Oil* followed a prior case issued by the National Labor Relations Board (“NLRB”), *D.R. Horton, Inc. & Michael Cuda*, 357 NLRB No. 184 (Jan. 3, 2012), which similarly held that the waiver of class claims interferes with employees’ rights to engage in concerted protected activities pursuant to Section 7 of the NLRA. However, the Fifth Circuit Court of Appeals rejected the NLRB’s decision in *D.R. Horton*, 737 F.3d 344 (5th Cir. 2013). *Murphy Oil* re-affirmed its decision in *D.R. Horton*.

II. NON-RELEASE TERMS OF THE SEVERANCE AGREEMENT.

A. No Restrictions. It is important to avoid provisions or language in an agreement that governmental agencies will find prevents or restricts an employee or former employee from cooperating with the governmental agency. *See EEOC Guidance on Non-Waivable Employee Rights Under the EEOC Enforced Statutes*, Number 915.002 (April 10, 1987).

- For example, recently the EEOC has focused its attention on severance agreements that contain provisions it deems to violate Title VII or impedes the ability of the EEOC to investigate and prosecute discrimination claims.

B. Recent Challenges by the EEOC to Severance Agreement Provisions.

- In *EEOC v. CollegeAmerica Denver, Inc.*, Case No. 14-CV-1232, 2014 U.S. Dist. LEXIS 167333 (D. Colo. Dec. 2, 2014), the EEOC challenged the following provisions contained in a severance agreement as violations of the ADEA:

(1.) ... refrain from personally (or through the use of any third party) contacting any governmental or regulatory agency with the purpose of filing any complaint or grievance that shall bring harm to CollegeAmerica

(3.) To not intentionally with malicious intent (publicly or privately) disparage the reputation of CollegeAmerica....

No decision was reached on these specific allegations as the court dismissed this specific challenge on procedural grounds.

- a. Specifically, the EEOC alleged that these types of provisions in severance agreements deterred employees from filing charges of discrimination and prevented the individual's ability from communicating with the EEOC, which interfered with the EEOC's statutory responsibility to investigate and enforce the anti-discrimination and anti-retaliation laws.
 - b. Thus, this is an important area to watch, and make sure severance/settlement agreements do not contain such provisions with which the EEOC or other governmental or regulatory agencies would take issue.
- In February 2014, the EEOC pursued a case against CVS Pharmacy, Inc., Case No. 1:14-cv-00863 (N.D. Ill. Feb. 7, 2014), alleging that certain provisions in a severance agreement that CVS distributed to over 650 employees violated Title VII. The case was ultimately dismissed on procedural grounds and did not get to the merits of the EEOC's case, but below is the specific language in those provisions, which the EEOC believed to be unlawful.
 1. Cooperation. "In the event Employee receives a subpoena, deposition notice, interview request, or another inquiry, process or order relating to any civil, criminal or **administrative investigation**, suit, proceeding or other legal matter relating to the Corporation from **any investigator**, attorney, or any other third party, **Employee agrees to promptly notify the Company's General Counsel by telephone and in writing.**" (emphasis added).

2. Non-Disparagement. “Employee will not make any statements that disparage the business or reputation of the Corporation, and/or any officer, director, or employee of the Corporation.”
3. Non-Disclosure of Confidential Information. “Employee shall not disclose to any third party or use for himself or anyone else Confidential information without the prior written authorization of CVS Caremark’s Chief Human Resources Officer.” Such information includes “information concerning the Corporation’s personnel, including the skills, abilities, and duties of the Corporation’s employees, wages and benefit structures, succession plans, information concerning affirmative action plans or planning...”
4. General Release of Claims. “Employee hereby releases and forever discharges CVS Caremark Corporation... from any and all causes of action, lawsuits, proceedings, complaints, **charges**, debts contracts, judgments, damages, claims, and attorneys’ fees against the Released Parties, whether known or unknown, which Employee has ever had, now has or which the Employee . . . may have prior to the date [of] this Agreement... **The Released Claims include...any claim of unlawful discrimination of any kind ...**” (emphasis added).
5. No Pending Actions; Covenant Not to Sue. “Employee represents that as of the date Employee signs this Agreement, Employee has not filed or initiated, or caused to be filed, or initiated, any complaint, claim, action or lawsuit of any kind against any of the Related parties in any federal, state, or local court, or agency. Employee agrees not to initiate or file, or cause to be initiated or file, any action, lawsuit, **complaint** or proceeding asserting any of the Released Claims against

any of the Released Parties. ... Employee agrees to promptly reimburse the Company for any legal fees that the Company incurs as a result of any breach of this paragraph by Employee.” ... “[n]othing in this paragraph is intended to or shall interfere with Employee’s right to participate in a proceeding with any appropriate federal, state or local government agency enforcing discrimination laws, nor shall this Agreement prohibit Employee from cooperating with any such agency in its investigation.” (emphasis added).

6. In this case, even though the employer’s covenant not to sue provision in the severance agreement contained disclaimer language (see above), the EEOC’s position was that this specific disclaimer clause was not sufficient to negate the other provisions which it believed violated Title VII.

2. In *EEOC v. Baker & Taylor*, Civil Action No. 13-3729 (N.D. Ill. 2013), the EEOC alleged that the following provisions contained in a severance agreement were in violation of Title VII:

I further agree never to institute any complaint, proceeding, grievance, or action of any kind at law, in equity, or otherwise in any court of the United States or in any state, or **in any administrative agency of the United States** or any state, country, or municipality, or before any other tribunal, public or private, against the Company arising from or relating to my employment with or my termination of employment from the Company, the Severance Pay Plan, and/or any other occurrences up to and including the date of this Waiver and Release, other than for nonpayment of the above-described Severance Pay Plan (emphasis added).

I agree that I will not make any disparaging remarks or take any other action that could reasonably be anticipated to damage the reputation and goodwill of Company or negatively reflect on Company. **I will not discuss or comment upon the termination of my employment in any way that would reflect negatively on the Company. However, nothing in this Release will prevent me from truthfully responding to a subpoena or otherwise complying with a government**

investigation (emphasis added).

The case was settled and the employer agreed to change the severance agreement by including a disclaimer that the agreement was not intended to limit an employee's right or ability to file discrimination charges with the EEOC or its state and local counterparts as well as affirmative statements regarding these employee rights.

C. SEC. The U.S. Security and Exchange Commission, Office of the Whistleblower ("SEC"), has similarly been scrutinizing employment contracts that attempt to discourage employees from reporting wrongdoing to the SEC or provisions in such agreements that could have a chilling effect on employee's communications with the SEC or related governmental agencies. The types of provisions that the SEC may find problematic include non-disclosure agreements, confidentiality agreements and/or non-disparagement agreements. SEC Rule 21F-17, 17 C.F.R. §240.21F-17(a) states:

No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement (other than agreements dealing with information covered by §240.21F-4(b)(4)(i) and §240.21F-4(b)(4)(ii) of this chapter related to the legal representation of a client) with respect to such communications.

1. In April 2015, the SEC fined KBR \$130,000 for requiring employees who participated in internal investigations to sign confidentiality agreements which the SEC believed violated the Dodd-Frank Act whistleblower protections. The takeaway is that the SEC will take issue with any publicly traded employer who requires employees to sign non-disclosure agreements whether as part of an investigation or as part of a severance agreement.
2. The SEC approved the following language with respect to an employee's non-

disclosure and/or participation provisions:

Nothing in this Confidentiality Statement prohibits me from reporting possible violations of federal law or regulation to any governmental agency or entity, including but not limited to the Department of Justice, the Securities and Exchange Commission, the Congress, and any agency Inspector General, or making other disclosures that are protected under the whistleblower provisions of federal law or regulation. I do not need the prior authorization of the Law Department to make any such reports or disclosures and I am not required to notify the company that I have made such reports or disclosures.

D. NLRB. The NLRB may also attack provisions in separation agreements, such as non-disparagement, confidentiality, cooperation provisions and the like, that restrain or interfere with an employee's rights to engage in concerted protected activity or other Section 7 rights.

E. Waiver of Right to File with the EEOC. Courts have repeatedly held that "a waiver of the right to file a charge is void as against public policy," as the purpose of the charge is not to seek recovery but to inform the EEOC of possible discriminatory conduct. *EEOC v. Cosmair, Inc, L'Oreal Hair Care Div.*, 821 F.2d 1085 (5th Cir. 1987). The filing of a charge allows the EEOC to investigate the alleged discrimination and to bring action against the non-government employers. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291-292, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002). ("[A]n employee's agreement to submit his claims to an arbitral forum [is not a] waiver of the substantive statutory prerogative of the EEOC to enforce those claims for whatever relief and in whatever forum the EEOC sees fit.")

F. Non-Assistance Provisions. Waivers preventing individuals from assisting others who file a charge of discrimination with the EEOC are void as against public policy. *Enforcement Guidance on Non-Waivable Employee Rights Under the EEOC Enforced*

Statutes, EEOC Notice Number 915.002 (April 10, 1987); *see also EEOC v. Astra USA, Inc.*, 94 F.3d 738 (1st Cir. 1996).

III. SETTLEMENT EFFECTS ON GOVERNMENT BENEFITS OR INSURANCE POLICIES

A. Individuals Receiving Governmental Assistance. If your client is receiving governmental benefits, such as Medicare or Medicaid, make sure whether receiving settlement monies will require subrogation or reimbursement for government assistance benefits to the recipient.

1. Medicare Secondary Payer Act, 42 U.S.C. §1395y. If you have a client who receives Medicare benefits, you need to report your client's claim to Medicare who is entitled to recoup benefits to the extent the client used Medicare monies to seek treatment of any injuries as a result of the employment claim.

- In these situations, the client needs to be made aware of the process and that no settlement funds can be released until the client obtains a release of lien from Medicare.
- Significant penalties can be assessed against not only the client but also against the attorneys involved if the process is not followed and Medicare repayment is not made.
- Employers may require indemnity in severance and/or settlement agreements since Medicare can go after all involved parties to recover the funds.

2. Florida's Medicaid Third-Party Liability Act. The state may seek reimbursement for Medicaid benefits paid in full from and to the extent of a settlement agreement for medical treatment provided to a Medicaid recipient without regard to any designations placed by the settling parties. Fla. Stat. §409.910 (2015); *see also*

Agency for Health Care Administration v. Estabrook, 711 So. 2d 161 (Fla. 4th DCA 1998); *Englich v. Agency for Healthcare Administration*, 916 So. 2d 994 (Fla. 4th DCA 2005).

- In these circumstances, Medicaid receives an automatic lien to be fully reimbursed for all medical expenses paid, except where full reimbursement would take away more than half of the third-party benefit paid. *Ross v. Agency for Health Care Administration*, 947 So. 2d 457, 458 n.1 (Fla. 3d DCA 2007).

B. Individuals on Disability or Having Insurance Policies. Make sure to advise your client about potential set-off issues.

IV. SETTLEMENT DISCUSSIONS

A. Drafting. Confront all issues in the beginning so that there are no surprises when you receive the drafted settlement agreement. To prevent any problems, draft a letter to your client outlining the terms of settlement, discuss the terms to make sure the client fully understands the terms of the agreement, and get the client's written approval before accepting the settlement offer.

B. Counteroffer Issues. Make sure your client understands the risks of making counteroffers or proposing edits to the agreement.

C. Client Issues.

1. An attorney can bind the client to a settlement agreement.
 - a. In the Eleventh Circuit Court of Appeals, state law governs the scope of an attorney's authority to enter into a settlement agreement. *BP Products N. Am. v. Oakridge at Winegard, Inc.*, 469 F. Supp. 2d 1128 (M.D. Fla. Jan. 3, 2007) *citing*

Murchison v. Grand Cyprus Hotel Corporation, 13 F.3d 1483 (11th Cir. Fla. 1994).

- b. Under Florida law, the party seeking to compel enforcement of a settlement agreement must demonstrate that the attorney had clear and unequivocal authority to enter into the settlement. *See BP Products*, 469 F. Supp. 2d at 1134; *Spiegel v. H. Allen Holms, Inc.*, 834 So. 2d 295, 297 (Fla. 4th DCA 2002) *citing Jorgensen v. Grand Union Co.*, 490 So. 2d 214 (Fla. 4th DCA 1986).

D. Confirmation. Draft confirmation letter of terms of agreement to opposing counsel.

- a. Oral settlement agreements are enforceable. *BP Products N. Am. v. Oakridge at Winegard, Inc.*, 469 F. Supp. 2d 1128, 1132 (M.D. Fla. Jan. 3, 2007).
- b. Uncertainty or lack of agreement as to non-material terms of the settlement will not preclude the enforcement of a settlement agreement. *BP Products*, 469 F. Supp. 2d at 1133 (*citing Blackhawk Heating & Plumbing Co., Inc. v. Data Lease Fin. Corp.*, 302 So. 2d 404, 407 (Fla. 1974) (“[T]he making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs—not on the parties having meant the same thing but on their having said the same thing.”); *see also U.S. ex rel. Osheroff v. MCCI Group Holdings, LLC.*, No. 10-24486-cv-SCOLA, 2013 WL 3991964 (S.D. Fla. Aug. 2, 2013) (“Uncertainty as to nonessential terms will not preclude enforcement, but terms not agreed to will not be enforced.”)

V. DRAFTING CONSIDERATIONS.

A. Be Sure to Narrow the Definition of Parties to the Lawsuit.

- 1. Definition of Parties Affects Waiver Issues.

- a. For example, in a settlement agreement involving harassment and/or a physical injury, the plaintiff may be required to waive all claims against the employer who is defined as former and present attorneys, agents, employees, executors, administrators, successors, predecessors, parent companies, officers, directors, subsidiaries successor and otherwise related entities.
 - b. If the plaintiff is required to waive claims against individual employees, make sure this waiver is contingent upon the perpetrator and all others accused signing general releases against plaintiff.
 - c. If the perpetrator-employees are not parties to the agreement, limit the release so that if the perpetrator-employee tries to sue the plaintiff, the plaintiff does not waive the right to bring any counterclaims against the perpetrator-employees in their individual capacity and/or to defend the action.
2. Definition of Parties Affects Re-Employment and Re-Application Rights.
- a. If an employer requires the plaintiff to waive all rights to re-apply or re-employment with the employer and the settlement agreement contains a broad definition of employer, the employee is waiving employment rights with the employer and any entities that it may acquire in the future.
 - b. Solutions:
 - Specifically define all entities of the employer to which the provision is to apply; or
 - Limit the definition of employer to those entities that are in existence on the date the client signs the Agreement.

- c. Merger Issues. If the client has concerns about a non-re-employment provision affecting future employment, put in language that if the employer merges with, acquires and/or is affiliated with an entity that employs the client, the client's employment will not be affected.

NOTE: The EEOC takes the position that waiving re-employment, reinstatement or re-application rights is unenforceable because it is retaliatory on its face. So, when the EEOC is involved in crafting or approving settlement terms, they will not approve any language to that effect.

B. Indemnification. Make sure your client does not waive their entitlement to indemnification from employer or covered insurance policies. This is particularly true for doctor-clients or high-level executives of companies.

C. Monetary Amount of Settlement.

1. Tax Considerations.

- a. Civil Rights Tax Relief. 26 U.S.C. §62(a)(20) allows an above-the-line deduction (to reduce adjusted gross income) for judgment and/or settlement amounts attributable to attorneys' fees and costs received by individuals on discrimination and retaliation claims filed under:

- Age Discrimination in Employment Act of 1967;
- Americans with Disabilities Act of 1990;
- Civil Rights Act of 1964;
- Civil Rights Act of 1991;
- Employee Retirement Income Security Act of 1974;
- Fair Labor Standards Act of 1938;
- Family and Medical Leave Act of 1993;
- National Labor Relations Act of 1935;
- Rehabilitation Act of 1973;
- Worker Adjustment and Retraining Notification Act of 1988; and
- Others.

- b. Whistleblower Tax Relief. Payments for attorneys' fees and costs for whistleblowers are also entitled to an above-the-line deduction to reduce adjusted gross income. 26 U.S.C. §62(a)(21).
- c. Payment for Sickness or Injuries and Emotional Damages. Settlements that compensate on account for personal **physical** injuries or **physical** sickness are excluded as gross income. 26 U.S.C. §104(a)(2).
 - 1) *Physical Injuries*. However, punitive damages received for **physical injuries** are taxable. 26 U.S.C. §104(a)(2) (excluding "the amount of any damages (*other than punitive damages*) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness" from taxable income).
 - 2) *Emotional Distress*. Additionally, compensation for emotional distress is not considered a physical injury for purposes of the Internal Revenue Code. 26 U.S.C. §104(a)(2); *See McGown v. Commissioner of Internal Revenue*, 2011 WL 3418253 (U.S. Tax Ct. 2011) (holding that settlement monies for emotional distress were not considered as damages received because of a physical injury or physical sickness where the evidence did not show that the taxpayer suffered physical injuries other than the symptoms of emotional distress).
- d. Allocation. Consider how damages are to be allocated.
 - 1) *Wages v. Non-wages*.

- If settlement monies are characterized as non-wages, then FICA, FUTA and withholding are not required; however, your client still will need to pay taxes.
 - Make sure you have a legitimate argument that the settlement monies are truly not compensation for wages.
 - If your client received unemployment benefits, then when characterizing wage portions, to avoid potential recoupment issues, put in language that the wages payment is for the waiver of re-employment or “compensation for future non-re-employment.” *Ching v. Unemployment Appeals Commission*, 783 So. 2d 367, 370 (Fla. 5th DCA 2001) (suggesting that had the parties’ settlement agreement indicated that the wages payment was compensation for future non-re-employment, it may not have constituted income subject to recoupment).
 - If characterized as non-wages, have employer agree not to issue payroll tax reports or reporting of wages or compensation to any state or federal taxing authority and have employer agree to issue a Form 1099.
- 2) *Penalties and Interest Because of Classification of Payment.* Each party should be responsible for any penalties and interest that may be assessed against them as a result of the classification of the monetary settlement.
- 3) *Client Considerations.*
- Advise the client to seek advice from a tax professional about how to best characterize the settlement proceeds.

- Explain to the client what you think realistically the client would recover at trial, the cost of this process and the time involved in this process.

D. Mutual Release.

1. Always make releases mutual.
2. Draft language that includes an agreement by the employer to indemnify the plaintiff if any claims are brought against the plaintiff arising out of the plaintiff's employment.
3. Make sure the plaintiff does not have any pay outstanding amounts (i.e., vacation, bonus and outstanding paychecks) before signing a release.
4. Insert carve-outs that the release does not waive the client's rights to vested retirement and/or 401 benefits; health insurance claims; workers' compensation claims³, or short-term or long-term disabilities benefits.

E. References.

1. Draft language that the employer agrees to give a positive letter of recommendation, drafted by your client and attach a copy of letter to the settlement agreement.
2. Where the employer will not agree to a positive letter of recommendation, at a minimum get a neutral letter of reference on company letterhead providing the client's dates of employment, last position held and no other information.
3. Include language that addresses what will be said if anyone calls the employer regarding the client.

F. Termination v. Resignation. Usually, it is preferable to characterize the plaintiff's separation of employment with the employer as a voluntary resignation. This will be

³ Worker's Compensation Law forbids the release of compensation or benefits due or payable except as provided in Florida Statute §440.22.

helpful when your client is seeking another job. Include language in the settlement agreement that all employer documents will reflect your client resigned.

- Address with your client any potential impact of characterizing as a resignation versus a termination on the receipt of unemployment benefits.

G. Purge Personnel Files. Often your client wants to clear his/her personnel record.

1. To satisfy this request by your client, include language in the settlement agreement that the employer will purge personnel files of warnings, reprimands, and poor reviews.
2. Because of the public records laws, the governmental entities will not destroy public records. However, you can try to negotiate to have the employer remove any bad records from the personnel file and place in a separate file, or have a document stapled on top of bad records indicating that they have been rescinded and/or corrected, etcetera.

H. Unemployment Compensation Considerations.

1. No Contest. Include a provision in the settlement agreement that the employer will not contest employee's entitlement to unemployment compensation benefits and that employee can disclose to unemployment the existence of the settlement agreement as required by law.
2. Waivers of Unemployment Benefits Unenforceable. Florida Statute §443.041(1) makes it unlawful for an employer to require an employee to waive the employee's rights to receive unemployment benefits. An employer who violates this statute commits a misdemeanor in the second degree.

3. Repayment. An employee can be required to repay any amount collected as unemployment compensation in the event that the employee enters into a settlement agreement which includes a back-pay award covering the same time period as the unemployment compensation.

- In *Ching v. Unemployment Appeals Commission*, 783 So. 2d 367 (Fla. 5th DCA, 2001), the court affirmed the Unemployment Appeals Commission's determination that the employee was liable for the repayment of unemployment compensation based upon his back pay award pursuant to a settlement agreement with his prior employer. The settlement agreement specifically stated that the amount paid to the employee constituted "payment to him of back pay."

e. However, as previously explained, in *Ching* the court suggested that the result may have been different if the parties had characterized the wage payment for the waiver of future re-employment or reinstatement.

4. Disqualification. Where the employee is negotiating their exit, be sure to apprise the client that the receipt of severance can disqualify them from the receipt of unemployment benefits for the amount of time the severance is to compensate the employee. Fla. Stat. §443.101(3)(b).

I. Non-disparagement Provision. Many times, an employer would like for the employee to sign a non-disparagement provision. Make this provision mutual.

1. Truthful Testimony. Include language in the non-disparagement provision that does not limit the employee's ability to give truthful testimony and/or to report violations to and/or cooperate or participate in a governmental and/or regulatory agency.
2. Social Media. Depending on the employee's situation, address whether a script needs

to be agreed upon for posting on social media, such as LinkedIn or Facebook.

J. Confidentiality.

1. Do Not Request. If an employer does not require a confidentiality provision, do not request one to be included in the settlement agreement.
2. Narrow Language. If you must agree on a confidentiality provision, narrow it as much as possible and provide a script as to what the parties can say.
3. Exceptions. Draft an exception to whom the employee can disclose the terms of their settlement agreement, such as their attorneys, financial advisors, family members, the Internal Revenue Service, and as required by law or to governmental and/or regulatory agencies.
4. Government Employers. It is improper to make severance and/or settlement agreements confidential with government employers, especially since they are subject to the public records laws. Fla. Stat. §215.425(5) (“Any agreement or contract, executed on or after July 1, 2011, which involves extra compensation between a unit of government and an officer, agent, employee, or contractor may not include provisions that limit the ability of any party to the agreement or contract to discuss the agreement or contract.”)
5. No Interference. “While confidentiality agreements are necessary in some instances, to facilitate settlement, they may not be subsequently employed by a litigant to obscure issues or otherwise thwart an opponent’s discovery.” *Smith v. TIB Bank of the Keys*, 687 So. 2d 895, 896 (Fla. 3d DCA 1997); *Scott v. Nelson*, 697 So. 2d 1300, 1301 (Fla. 1st DCA 1997) (“[S]ettlement agreements which suppress evidence violate the greater public policy.”) (Citation omitted). So, an all-inclusive confidentiality

clause prohibiting responding to inquiries on the facts of the claims are presumptively invalid.

6. Liquidated Damages. If the employer requires a liquidated damages clause as part of the confidentiality provision, make the employer pay extra for this term.
 - a. In Florida, liquidated or punitive damages clauses that are really penalty clauses in disguise are unenforceable in settlement agreements. The Florida courts have consistently found such contractual provisions are unenforceable where the penalty is disproportionate to the damages. *See Hyman v. Cohen*, 73 So. 2d 393, 399 (Fla. 1954).
 - b. Consequently, the Fifth Circuit has applied this analysis to those provisions in non-disclosure/non-compete agreements. It has concluded that parties may stipulate in advance to an amount to be paid as liquidated damages only where the damage from the breach cannot easily be ascertained and is not grossly disproportionate to any damages that might reasonably be expected to flow from a breach. “The theory is simply that we do not allow one party to hold a penalty provision over the head of the other party ‘in terrorem’ to deter that party from breaching a promise.” *Burzee v. Park Avenue Insurance Agency, Inc.*, 946 So. 2d 1200 (Fla. 5th DCA 2007) *citing Crosby Forrest Products, Inc. v. Byers*, 623 So. 2d 565, 567 (Fla. 5th DCA 1993). Further, settlement agreements in Florida are interpreted and governed under contract law. *BP Products N. Am. v. Oakridge at Winegard, Inc.*, 469 F. Supp. 2d 1128 (M.D. Fla. Jan. 3, 2007). Under that analysis, liquidated damage provisions in severance agreements should equally be unenforceable where an arbitrary sum is chosen by the employer.

K. Merger Clause and Other Agreements. Make sure to find out if the employee has any other agreements with the employer, such as a non-compete or non-solicitation agreements. Where possible, include language that the settlement agreement supersedes any prior agreements between the parties to try to invalidate prior agreements to which the employee may not want to continue to be bound.

L. Enforcement of Settlement by Courts. Include a provision in the order of dismissal that the federal court retains jurisdiction to enforce the settlement agreement. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994). Once a case is settled and the court has dismissed the case, the court does not retain jurisdiction for purposes of enforcing the settlement agreement unless the court specifically retains jurisdiction for this purpose in the order of dismissal. *See* Fed.R.Civ.P. 41.

DISCLAIMER

The information provided in these materials was accurate at the time written. The Sass Law Firm makes no assurance that the laws, statutes, rules, regulations or ordinances referenced herein have not been changed, amended or rescinded. Additionally, relevant new case law may have been recently published.

These materials are being made available for informational purposes only and are not to be relied upon as legal advice.

If you have an employment law question,
we urge you to seek legal counsel.

Thank you.

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