Employee Severance Agreements:
Creating and Negotiating Enforceable Release and Pay Provisions

By: Ian D. Meklinsky, Esq.[1]

A. Standards for Valid Release

a. No standard form.

b. Can address a wide range of issues including releases factual or potential claims to covenants not to compete.

c. Release must be knowing and voluntarily.

d. Must be supported by consideration.

   i. Must give employees something of value—and something to which they would not otherwise be entitled (i.e., severance pay-- as long as they are not already entitled to receive such pay under state law, employer's severance plan, a CBA or an individual employment contract).

e. Older Workers' Benefit Protection Act ("OWBPA").

   i. In 1990, Congress amended the *Age Discrimination in Employment Act* (ADEA) with the *Older Workers Benefit Protection Act* (OWBPA). The OWBPA changed the rules for age discrimination releases by setting strict criteria for releases both of protected rights (i.e., a release before a claim is filed) and disputed claims (i.e., releases in settlement of EEOC charges or lawsuits).

   ii. Congress presumed that age discrimination is harder to detect than other types of employment discrimination, and there was concern that releases were being used in situations where employees would not reasonably be expected to know or suspect that age may have played a role in the termination decision. Congress, therefore, concluded that older workers routinely were releasing potential age discrimination claims without being aware of information that would enable them to make an informed decision.

   iii. There also was concern about the prevalence of non-negotiable releases, and the practice of linking severance benefits to a release of claims. What Congress saw was older workers being confronted on a mass basis with a choice between a termination without benefits, or receipt of benefits only upon a complete release of potential claims, including age discrimination claims. The perception was that the ADEA was being undermined by employers who routinely were securing either uninformed or coerced releases of protected rights.

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[1] Ian D. Meklinsky would like to thank his colleagues, Donia Sawwan and Brynn Hollows, for their significant assistance in the preparation of this outline.

iv. From this came the OWBPA, which sets forth the "minimum" requirements for an age discrimination release before it may be considered "knowing and voluntary" under federal law and, thus, binding on the terminated employee. OWBPA requirements ultimately were extended to all types of age discrimination releases, including those by employees terminated during reductions in force and those by individually terminated employees, releases by employees with existing legal claims and those who do not believe their rights have been violated, and even releases by employees who leave their employment voluntarily.

v. Employers should be mindful of the OWBPA's extremely specific release requirements and should be aware that courts interpret those requirements strictly (i.e., contrary to employer interests). In the event of a dispute about OWBPA compliance, it is the employer who has the burden of proving compliance.

vi. The OWBPA establishes certain standards for enforceability of a release of a claim under the ADEA. Waiver between the employer and the individual must:

1. Be written in language easily understood by the average employee.

    a. Releases cannot be choked with legalese. Releases should be as brief as possible and language used should be plain. The educational level and general sophistication of the individual employee or average employee should be taken into account, and the release modified accordingly. A release also should recite that the employee understands the language of the release and its effect, specifically including that she is releasing any age discrimination rights or disputed claims she may have as of the date she executes it.

2. Specifically refer to the rights or claims arising under the ADEA.

3. Not waive rights or claims that may arise after the date of the waiver is executed.

4. Provide for consideration which is in addition to anything of value to which the individual is already entitled.

5. Advise the individual in writing to consult with an attorney prior to executing the agreement.

6. Give the individual at least 21 days within which to consider the agreement.

    a. If the employer requests the release in connection with a group or class termination, the employer must provide

employee with at least 45 days to consider the release and provide the employee with detailed information concerning those eligible and ineligible for the separation package.

b. An employee executing a release in settlement of an existing EEOC charge or lawsuit must be given "a reasonable period of time" to consider a release.

   i. Although the OWBPA is silent on the point, employers are wise to treat these "consideration periods" as being triggered only upon an employee's actual receipt of the written release agreement. It is not enough that an employee simply be told what the terms of a release will be. Also, a release should include a clear statement that the employee has been given the appropriate amount of time to consider the release agreement.

   ii. Some employers are under the mistaken impression that the consideration period must pass completely before a release may be executed. In fact, an employee may execute a release before the applicable consideration period has expired. The OWBPA only requires that an employee be "given" adequate time to consider a release. There is nothing in the statute that prevents an employee from accepting a release agreement earlier.

   iii. What a "reasonable period of time" may be in the context of a release in settlement of an existing claim is not well-defined. What is a reasonable period of time, no doubt, will depend on the circumstances. Generally, however, a reasonable period of time will be considerably less than the 21 or 45-day consideration periods. Obviously, if there is an existing claim the employee already is aware of her rights, she believes they have been violated and she probably is represented by an attorney. As long as there is no act of coercion by an employer and the release agreement specifically states that the employee was given a reasonable period of time in which to consider the agreement, the OWBPA should be satisfied.

7. Provide for a seven day revocation period.

    a. The OWBPA states that a release "shall not become effective or enforceable until the revocation period has expired". Therefore, unlike the consideration period, the revocation period cannot be waived by an employee.

Case Law: Supreme Court Case of *Oubre vs. Entergy Operations, Inc.*

- In 1998, the U.S. Supreme Court held in *Oubre vs. Entergy Operations, Inc.*, that a release of age claims which does not fully comply with OWBPA requirements is of no effect. The employee in *Oubre* was given the option of either improving her job performance during the coming year or accepting a voluntary arrangement for her severance. The employer gave her a packet of information about the severance agreement and gave her 14 days to consider her options, during which she consulted with attorneys. The employee then accepted the severance package and executed a release in which she agreed to "waive, settle, release, and discharge any and all claims" she may have had against her former employer.

- The Supreme Court held that the release did not comply with OWBPA in at least three respects, including: 1) the employer did not give the employee enough time to consider her options (i.e., she should have had 21 days instead of 14); 2) the employer did not give the employee seven days after she signed her release to change her mind; and, 3) the release made no specific reference to claims arising under the ADEA.

- The employer argued that its admitted failure to comply with the OWBPA was not prejudicial to the employee and, moreover, that it did not matter because the employee had not tried to revoke her release, although she believed her rights had been violated, and she had not returned the money she had been paid for her release. The employer argued that by her actions the employee had "ratified" (i.e., agreed to abide by) her release although it was defective under the OWBPA.

- The Supreme Court rejected the employer's arguments and held simply that releases of age discrimination claims which do not comply with all applicable OWBPA requirements are invalid and, thus, of no effect.

- The Supreme Court also held that an employee who executes a release defective under the OWBPA does not have to return the money she was paid before suing her former employer for age discrimination. In other words, where the employer fails to comply with OWBPA requirements, an employee may sue for age discrimination notwithstanding her execution of the release, and she can bankroll her lawsuit with the very money the employer paid for her release.

- *Oubre* makes clear that courts will interpret OWBPA requirements strictly and that any defect, no matter its magnitude, will invalidate a release of age claims. Further, the employer will be unable to demand return of the money it paid for the release prior to any related litigation. *Oubre* also illustrates the harsh consequences for failure to comply with the OWBPA; indeed, the consequences of non-compliance may be so harsh that it will cause employers to question whether releases of age discrimination claims are worth the effort, especially in mass layoff situations.

Tender Back of Consideration - Final Rule

- In light of *Oubre*, the EEOC amended its OWBPA regulations at 29 CFR 1625.23, effective January 10, 200l. Consistent with the Supreme Court decision, section (a) of the Regulation states that an individual wishing to challenge the validity of an ADEA waiver is not required to return the consideration received before filing a lawsuit or discrimination charge. The EEOC's guidance in section (b) of the Regulation, however, goes far beyond the teachings of *Oubre* requiring employers to reassess the content of a waiver.

- Under section (b) of the Regulation, "No ADEA waiver…may impose any condition…adversely affecting any individual's right to challenge the agreement." This prohibition includes "provisions allowing employers to recover attorneys' fees and/or damages because of the filing of an ADEA suit" (i.e., a traditional covenant not to sue). The EEOC's position is based on the view that such a clause discourages good faith challenges and thus, interferes with an employee's statutory rights. The EEOC maintains that the Supreme Court's reasoning in *Oubre* supports this position. In essence, it argues that if the financial pressures of tender back and ratification are illegal under the OWBPA, then so are the pressures of an obligation to pay an employer's legal fees and costs. The section of the Regulation ends by noting an employer's continued ability to recover damages authorized under federal law. In the opinion of the EEOC, this is limited to ADEA suits brought in bad faith--a case that is considerably easier to state than to prove. See 29 CFR 1625.23.

f. FMLA: Prior Case Law and New Regulations

i. Prior Case Law

1. FMLA Regulation Section 825.220 provides "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA." In the past, courts have disagreed as to whether this language prohibits only the prospective waiver of FMLA rights, or also prohibits the retrospective settlement or release of FMLA claims based on past employer conduct, such as through settlement or a severance agreement, without Department of Labor ("DOL") or court approval.

2. In *Taylor v. Progress Energy*, the Fourth Circuit interpreted this regulation to prevent employees from settling past claims for FMLA violations with employers without the approval of the DOL or the courts.

3. In *Faris v. Williams*, the Fifth Circuit found that the plain meaning of the DOL's regulation prohibits prospective waiver of rights only and not retrospective settlement of claims.

ii. New Regulations

1. The new FMLA regulations make clear that the waiver prohibition applies only to prospective FMLA rights; employees and employers are permitted to agree voluntarily to the

settlement of past claims without having first to obtain the permission of the DOL or the courts.

2. Thus, an employee may sign a severance agreement with her employer releasing the employer from all FMLA claims based on past conduct by the employer. An employee may also settle an FMLA claim against her employer without DOL or court approval.

B. What Cannot Be Released

a. Employer cannot require employee to waive the right to file a charge of discrimination with the EEOC (pursuant to EEOC 1997 Enforcement Guidance).

i. EEOC takes two positions on such waivers:

1. Requiring an employee to waive her protected right to file a charge or participate in an investigation is void against public policy.

2. Requiring an employee to waive this right violates the anti-retaliation provisions of Title VII because such agreements have a "chilling effect on the willingness and ability of individuals to come forward with information" and interfere with the EEOC's purpose.

ii. United States Court of Appeals for Third Circuit (which has jurisdiction over Delaware, Pennsylvania, New Jersey and the Virgin Islands) has held that a separation agreement including broad release language regarding the filing of charges "in any administrative, judicial or other forum" constitutes a *per se* violation of the anti-retaliation provisions of ADEA, Title VII, EPA and ADA because the purpose of filing an agency charge is not to seek recovery from an employer but to inform the administrative agency of possible discrimination.

b. Claims for Workers' Compensation Benefits.

c. Claims under the Fair Labor Standards Act (FLSA).

d. Claims to challenge the Agreement or claims arising after the execution of the agreement.

e. Claims with regard to vested benefits under an ERISA governed retirement plan.

C. State Specific Requirements

<u>New Jersey</u>:

- Waiver must establish that party charged with waiver knew of her legal rights and deliberately intended to relinquish them. Waiver must be knowing and voluntary.

Waiver is evaluated under "totality of circumstances" standard including and factors to be considered in determining whether a release was knowing and voluntary include:

- the clarity and specificity of the release language;
- the employee's education and business experience;
- the amount of time the employee had for deliberation about the release before signing it;
- the role of the plaintiff in deciding the terms of the agreement;
- whether the employee's rights were known or should have been known when the release was executed;
- whether the employee sought or was encouraged to seek the advice of counsel; and
- whether the consideration given and accepted for the release exceeded the benefits to which the employee was already entitled by contract or law.

- **Therefore, release should clearly indicate claims being waived (i.e., NJLAD, CEPA, etc.) in order to demonstrate waiver of such claims was knowing and voluntary.

California:

- The release should contain language that the employee waives rights under section 1542 of the California Civil Code, and must quote the actual code section in the release in order for the waiver to be effective. California Civil Code section 1542 states:

> "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."

Minnesota:

- If a Minnesota Human Rights Act release is being sought, a 15-day revocation period normally must be offered unless the release is given in settlement of a claim filed with the Department of Human Rights or another administrative agency or judicial body.

- The employee must be advised of her right to rescind in writing.

- The employee must rescind the release in writing and deliver the rescission to the released party by hand within the 15-day period or mail the rescission to the released party, postmarked within the 15- day period, via certified mail. See Minn. Stat. § 363.031.

West Virginia:

- If a West Virginia Human Rights Act release is being sought, the waiver must be knowing and voluntary. A waiver will not be considered knowing and voluntary unless the following conditions are met:

    - The waiver is part of an agreement between the individual and the employer that is written in plain English and in a manner calculated to be understood by the average person with a similar educational and work background as the individual in question;

    - The waiver specifically refers to rights or claims arising under the West Virginia Human Rights Act;

    - The waiver dos not extend to rights or claims that may arise after the date the waiver is executed;

    - The individual waives a right only in exchange for consideration that is in addition to anything of value to which the individual is already entitled;

    - The individual is advised in writing to consult with an attorney prior to executing the agreement and is provided with the toll free telephone number of the West Virginia State Bar Association (866-989-8227);

    - The individual is given 21 days within which to consider the agreement; and

    - The agreement provides that for a period of at least 7 days following execution of such agreement, the individual may revoke the agreement in writing, and the agreement shall not become effective or enforceable until the revocation period has expired.

D. Options When Drafting

a. In a 2006 Western District of New York case against Eastman Kodak, the EEOC approved the following language for settlement agreements:

    i. "Except as described below, you agree and covenant not to file any suit, charge or complaint against [employer] in any court or administrative agency, with regard to any claim, demand, liability or obligation arising out of your employment with [employer] or separation therefrom. You further represent that no claim, complaints, charges, or other proceedings are pending in any court, administrative agency, commission or other forum relating directly or indirectly to your employment by [employer]. Nothing in this agreement shall be construed to prohibit you from filing a charge or participating in any investigation or proceeding conducted by the EEOC or comparable state or local agency. Notwithstanding the foregoing, you agree to waive your right to recover monetary damages in any charge or lawsuit filed by you or by anyone else on your behalf.

1. An employee executing a release in settlement of an existing EEOC charge or lawsuit must be given "a reasonable period of time" to consider a release.

b. Agreements Not To Reapply.

i. Employer should consider including a provision providing that the employee agrees not to seek reemployment.

1. In the absence of such provision, if the employer later refuses to rehire the person, it could face a retaliation claim.

c. Blue Pencil.

i. To ensure that the release is not interpreted as overbroad and unenforceable in its entirety, the agreement should include language providing the court with authority to "blue pencil" or narrow any offending provision in the agreement to make it enforceable.

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Ian practices labor and employment law, representing employers across the country in both union and non-union contexts. He works closely with human resource professionals and in-house counsel to navigate the increasingly complex workplace-related rules and regulations mandated by the myriad of laws to provide creative, practical, cost-effective advice and solutions to employment issues.

In the unionized area, Ian focuses on:

- union avoidance/union organizing campaigns
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- strikes, mass picketing, and union access disputes
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Ian also counsels and assists employers with respect to, among other things:

- development and implementation of personnel policies and procedures
- discipline and discharge of employees as well as employee leave issues
- development and administration of Affirmative Action Plans
- negotiation, drafting and enforcement of employment and severance agreements
- harassment avoidance and training

Additionally, a significant portion of Ian's practice includes:

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In conjunction with the firm's Tax Department, Ian provides advice with respect to tax implications of employment-related matters and provides extensive counseling and guidance on employee benefits.

Beyond Fox Rothschild

Ian was a Pupil and now is a Barrister in the New Jersey State Bar Association/Labor & Employment Law Section, the Sidney Reitman Employment Law American Inn of Court, and was the Assistant Coordinator for the Camden County Bar Association for the 1994 New Jersey State Bar Foundation Vincent J. Apruzzese Mock Trial Competition. He lectures frequently to various professional, civic and employer groups. Ian publishes on employment-related topics and is

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often quoted on these subjects. He is a contributing author to the American Bar Association's treatise on The Fair Labor Standards Act, West Publishing's treatise on Advising Small Businesses, and the ALI-ABA Manual on Advising Clients.

In the News

- Quoted, "Heavy Handed," *Daily Business Review*, Miami, Florida (June 27, 2008)
- Quoted, "Local Employment Laws Flourish," *The National Law Journal* (June 23, 2008)
- "Workers Surprised by Shutdowns may have little recourse," *Baltimore Sun* (Dec. 5, 2007)
- Quoted in a variety of newspapers and on television regarding the Paid Family Leave legislation pending in the New Jersey Legislature, including *The Courier Post* (Nov. 29 and Dec. 1, 2007); *The Express Times* (Nov. 29, 2007); *The Asbury Park Press* (Dec. 1, 2007); and, NJN TV Network (Nov. 28 and Nov. 30, 2007)

Articles/Publications

- Author, "Posting And Notice Requirements for New Jersey Paid Family Leave," *NJ Business* (January 2009)
- Author, "New Jersey Enacts a Paid Family Leave Act," Mercer Business (October 2008)
- Author, "New Jersey Moves to the Front of the Paid Time Off Line," *Labor & Employment Department Alert* (May 2008)
- Author, "N.J. Moves To The Front Of The Paid Time Off Line," *Employment Law360* (April 09, 2008)
- Author, "New Jersey Enacts a Paid Family Leave Act," *NJ Labor & Employment Law Quarterly* (Spring 2008)
- "The Benefits of Employee Handbooks," *NJBIZ* (April 23, 2007)
- "Mindful Monitoring," *Security Management* (April 01, 2007)
- "Employers and the Civil Union Law," *New Jersey Lawyer* (March 26, 2007)
- "Your Employee Leave Policy," *New Jersey Lawyer* (March 20, 2006)
- "Avoiding Employment Litigation Through Effective Recruitment and Hiring," *NJ Business Magazine* (March 01, 2006)
- "Does your Company's Employment Release Cover all the Bases?," *The Metropolitan Corporate Counsel* (March 01, 2005)
- "Reconciling Employee Leave Policies with Overlapping State and Federal Laws," *NJ Business Magazine* (June 01, 2004)

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Speaking Engagements

- Speaker, "Paid Family Leave: How It Will Affect Your Business," Voorhees, NJ (November 21, 2008)
- Speaker, "The Leave vs. Compensation Debate - NJ Paid Family Leave," *NJ Business & Industry Association* (October 24 and 29, 2008)
- Speaker, "Employment Litigation Avoidance," *Mercer County Dental Society* (October 21, 2008)
- Speaker, "Employee Severance Under Attack: The Court's Latest Rulings," *Strafford Publications* (July 02, 2008)
- Speaker, "Is It Time for an Unfair Dismissal Act?" *FMCS* (May 02, 2008)
- Speaker, "Expert Testimony and Damages," *Mercer American Inn of Court* (March 12, 2008)
- Speaker, "The Leave vs. Compensation Debate - FMLA Seminar," *NJ Business & Industry Association* (March 07, 2008)
- Speaker, "Employee Severance Under Attack: The Court's Latest Rulings," *Strafford Publications* (January 16, 2008)
- Presenter, "Employee Privacy in the Workplace - What's an Employer to Do?," *CPEs for CPAs seminar sponsored by Fox Rothschild* (October 31, 2007)
- Presenter, "Expert Testimony and Damages," *New Jersey Society of CPA's Litigation Conference* (October 25, 2007)
- Presenter, "COBRA and HIPAA Compliance for Employers," *Corporate Synergies 2007 Fall Institute* (September 25, 2007)
- Presenter, "CEPA Update 2007: The Basics and Things to Come," *NJ State Bar Association - Labor and Employment Law Section* (June 26, 2007)

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Our employment litigation practice includes trial and appellate work before all state and federal courts and agencies as well as private arbitrations. Our attorneys have experience in litigating matters involving claims of age, disability, sex and race discrimination, sexual harassment, wrongful discharge, whistleblower violations, non-compete, non-disclosure and trade secret disputes, defamation, fraud, invasion of privacy, public policy, employment rights, intentional infliction of emotional distress, and a wide variety of other common law and statutory claims arising in the employment context.

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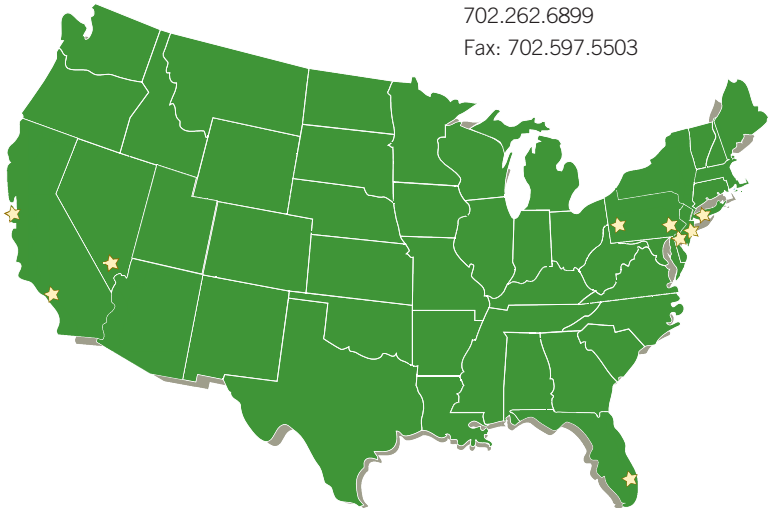

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Does Your Company's Employment Release Cover All The Bases?

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Corporate Counsel and Human Resources Managers are frequently called upon to prepare separation agreements for departing employees. As with any form of agreement, separation agreements can address a wide range of issues including releases of actual or potential claims to covenants not to compete. While many have their favorite "form" from which to work, a periodic review is critical to ensure that any changes in applicable law – or the interpretation of applicable law – are properly integrated into the document.

Obviously, a detailed review of all issues that could be addressed in a separation agreement is beyond the scope of anything other than a law review article or treatise. However, the subject thumbnails set forth below will allow professionals who deal with these forms of agreement to approach them with additional insight.

Releasing Age Claims: The Older Workers' Benefit Protection Act ("OWBPA") establishes certain, irreducible standards for enforceability of a release of a claim under the Age Discrimination in Employment Act (the "ADEA"). While simply meeting the minimum statutory requirements does not satisfy the burden of proving that the release is knowing and voluntary, failure to do so can be fatal to the enforceability of the release.

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The OWBPA requires, at a minimum, that the waiver agreement between the individual and the employer:

- be written in language easily understood by the average employee;
- specifically refer to rights or claims arising under the ADEA;
- not waive rights or claims that may arise after the date of the waiver is executed;
- provide for consideration which is in addition to anything of value to which the individual already is entitled;
- advise the individual in writing to consult with an attorney prior to executing the agreement;
- give the individual at least 21 days within which to consider the agreement;
- provide for a seven-day revocation period.[1]

Moreover, if the employer requests the release in connection with a group or class termination, the employer must provide the employee with at least 45 days to consider the release and provide the employee with detailed information concerning those eligible and ineligible for the separation package.

Child Support Judgments: Some states have taken steps to recover child support judgments with the assistance of employers and their attorneys. Under New Jersey law, judgments for child support docketed with the Clerk of the Superior Court are liens against the net proceeds of settlements negotiated prior or subsequent to the filing of a lawsuit, civil judgments, civil arbitration awards, inheritances or workers' compensation awards. The law defines "net proceeds" as any amount of money in excess of $2,000 payable to the prevailing party or beneficiary after all costs relating to the lawsuit (attorneys' fees, etc.) are deducted from the award. Before an attorney distributes any net proceeds of settlements, judgments, inheritances, or awards to the prevailing party or beneficiary, that attorney must initiate a search of child support judgments to check if the recipient is a child support debtor. If a judgment is found, the attorney must provide the Probation Division with a copy of the settlement within thirty (30) days of identification of the judgment. An attorney who abides by the law will not be liable to the prevailing party, beneficiary, or that person's creditors. Impliedly, an attorney who does not abide by the law could be liable to the child support creditor.

Filing of Administrative Charges: Many separation agreements include broad release language requiring employees to agree not to institute any "proceeding, action, complaint, charge or grievance" against the former employer "in any administrative, judicial, or other forum" with respect to any acts occurring before the date of the agreement. Some courts, such as the United States Court of Appeals for the Third Cir-

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cuit, which has jurisdiction over Delaware, Pennsylvania, New Jersey and the Virgin Islands, have held that a separation agreement including the foregoing language constitute a *per se* violation of the anti-retaliation provisions of the named employment statutes (ADEA, Title VII, the Equal Pay Act, and the ADA) because the purpose of filing an agency charge is not to seek recovery from the employer but to inform the administrative agency, such as the Equal Employment Opportunity Commission ("EEOC"), of possible discrimination. Based on this precedent, employers should be wary of using overly broad releases which waive an individual's right to file an administrative charge.

Agreements Not to Reapply: Employers also should consider including a provision providing that the employee agrees not to seek reemployment. In the absence of such an agreement, should the employer later refuse to rehire the person, it could face a retaliation claim under the applicable federal or state anti-discrimination laws.

Covenants Not to Compete: Often employers wish to include some restriction on an employee's ability to compete or seek to enforce an existing restriction from an employment agreement. Whether or not such restrictive covenants are enforceable depends on state law. In general, courts in New York, New Jersey and Pennsylvania will enforce covenants not to compete to the extent that they are geographically and temporally reasonable and protect certain interests of the employer (such as trade secrets or confidential information). What is reasonable and what constitutes a protectable interest are determined on a case-by-case basis. In addition, each state has certain idiosyncrasies in the manner in which it will enforce such covenants. For example, courts in New York and Pennsylvania have refused to enforce such restrictions where the employer terminates the employment relationship unless the termination is "for cause." Accordingly, employers should not assume that the existence of the covenant will guarantee them the protection that they seek.

Tax Treatment of Payments: Employers and employees are always looking for advantageous ways to structure payments to eliminate or reduce the amount of federal, state and even local taxes on severance payments. While the general rule of thumb should be that all such payments are taxable and, in some instances, also subject to income tax withholding, there may be certain circumstances whereby all or a portion of a payment can be made on a non-taxable basis (*e.g.*, where there are physical manifestations of emotional distress or a physical injury). Where employees are represented by counsel, aggressive attorneys have sought to minimize tax consequences by making part of the payment directly to the employee's attorney for his or her "attorney fee" component of the payment amount. In the past, the IRS has taken the position that the payment to the employee's attorney was "constructively received" by the employee and, therefore, taxable to the employee as well as to his or her attorney as well. The result was, among other things, double taxation. The Civil Rights Tax Relief Act provisions of the American Job Creation Act of 2004 (signed by President Bush on October 22, 2004) creates a special deduction for taxpayers that eliminates this double taxation. Depending upon the amount of money in question and the increased financial burden of income tax obligations of the employer, it may be justified for an employer to look more closely into the set of circumstances to determine if there is a means of characterizing all or a portion of the payment as non-taxable to the employee including, but not limited to, making an appropriate portion of the payment directly to the employee's attorney.

Tender Back of Payments: Severance agreements sometimes require a former employee to repay (a/k/a tender back) to the employer the monies under the agreement in the event the employee violates the terms of the agreement – for example, by filing a complaint in court or breaching the confidentiality of non-compete provisions. Within the context of the ADEA, the EEOC has promulgated regulations that prohibit the enforcement of tender back rules with respect to the filing of administrative charges. Outside of the ADEA context, courts have frequently relied upon general contract principles to find that tender back provisions are appropriate and enforceable if properly drafted. As a result, care must be taken to draft any tender back provision with an eye toward not offending the EEOC's rule while providing the greatest protection for the employer based upon the law of the applicable jurisdiction.

Unemployment Compensation: Upon termination of employment, many employees apply for unemployment compensation benefits, even in those instances where the same employees will be receiving some form of severance payment. The question then becomes whether the severance payment is true "severance" or "payment in lieu of notice." The distinction may be significant depending upon the jurisdiction. For example, under New Jersey law, traditional severance does not affect an applicant's ability to apply for and obtain unemployment compensation; however, "pay in lieu of notice" prohibits an employee from receiving unemployment compensation during the same period they are receiving severance that has been so characterized. When preparing severance agreements, consideration should be made as to how such payments are characterized. Alternatively, some employers factor the amount of unemployment compensation anticipated to be received by the former employee into their determination of the amount of severance to be made to the employee.

Employee Benefits Post Termination: Employers may want to provide group health insurance to employees post-termination. While nothing prohibits such action, care should be taken to make sure the provision of the benefit is done properly and effectively. While many group health insurance contracts permit "active" employees to participate in the benefit plan, most contracts do not cover terminated employees within the definition of eligible participants. As a result, the most effective and ultimately proper way to provide group health insurance to a terminated employee would be to have the employee exercise his or her right to COBRA continuation coverage and for the employer to then make the appropriate monthly premium payment on behalf of the employee (and his or her covered beneficiaries). The structure of this arrangement in any severance or settlement agreement should be very specific and cover various issues including, but not limited to, changes in benefit plans and premiums, the length of time of the employer's obligation to make the premium payment and any conditions precedent to the employer's obligations.

Assignment: Severance agreements usually bind the employer. It is important, however, for the employer to reserve the right to assign its rights and obligations under the agreement. This assignment right should be set forth in the agreement itself as some states do not recognize a general right of assignment without language to that effect in the agreement. While this may not appear to be an important issue, it may rise to that level especially with respect to enforcement of covenants not to compete and confidentiality provisions. In certain cases, it may even be beneficial for the employer to assign its obligations – for example the obligation to provide group health insurance or make periodic payments – to another entity.

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[1] *These requirements do not need to be met where an employee is not releasing a claim under the ADEA. Thus, where the employee is under age 40, the employer does not need to give the employee 21 days in which to consider the agreement (although the employee should have a reasonable period of time in which to do so) and the employer does not have to permit the employee any revocation period.*