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Employee Severance Agreements: Best Practices for Drafting

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A. INTRODUCTION

1. **Benefits of a Severance Agreement**
    a. Certainty and finality—Resolve issues and avoid litigation

    b. Limit employer's losses—May be able to settle dispute at the outset for less than at a later date after employee has sustained greater loss than may have anticipated (unable to find another position) and has become entrenched in position.

    c. Avoid litigation costs, including attorneys' fees as well as time/preoccupation of company executives, managers, witnesses associated with litigation

    d. Avoid negative outcome—Risk of adverse judgment

    e. Obtain additional terms that may be desirable to employer (and did not obtain at outset of or during employment) and cannot obtain through litigation

        i. Non-compete provisions

        ii. Confidentiality

        iii. Transition and other assistance

2. **Negotiations with employee**

    a. May make good sense depending on the circumstances

    b. Increases likelihood of employee acceptance

    c. Employee's requests may be acceptable and not particularly burdensome

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[1] Harriet E. Cooperman would like to thank her partner, Joan M. Corcoran, for writing the 409A section of this paper, and her associate, Matthew L. Salm, for his research of various issues relating to the legal effect and validity of various severance agreement provisions.

d. What is goal of company in getting release signed?

e. Reasonable requests to extend the time limit for return of executed agreement should be granted but not unlimited

3. Use of Lawyer

a. Importance of and value of customized severance agreements rather than cookie-cutter approach

b. Laws, regulations and court and agency interpretations change—need to make sure agreement is up-to-date with the current law and interpretations

c. Tinkering with language/provisions without attorney review can result in voiding release/agreement.

    i. Lay persons do not necessarily understand or appreciate the use of specific terms, language, provisions

d. Advise employee of his/her right to use lawyer

    i. It is important that employee understands the nature and scope of release and that s/he is waiving his/her legal rights in exchange for severance benefits

    ii. Agreement should expressly state that employee has been advised of his/her right to consult an attorney of his/her own choosing, and has been encouraged to do so.

    iii. Letter accompanying severance agreement also should advise employee of right to counsel

    iv. Concern that employee's use of legal counsel will result in attorney trying to negotiate more changes/benefits for employee and/or that employee will become more litigious oftentimes overstated and not realized.

    v. Benefits of dealing with and/or through counsel often outweigh negatives

4. State Law Concern

a. Multi-state employers—Cannot necessarily use the same agreement terms in every location

b. State and local laws vary. Need to review applicable laws, regulations, and interpretations to ensure that agreement is compliant with applicable state and local law

c. Not good practice to make agreement conform to the highest common denominator. If law in one jurisdiction is more restrictive than in other jurisdictions where employer operates, why impose greater restrictions on agreements in less restrictive jurisdiction just for the sake of having a uniform agreement companywide?

d. Some differences:

   i. Vacation payout—is it required?

   ii. Timing of payment for wages earned

   iii. Form and language of release

   iv. Claims prohibited from being released

   v. Revocation rights

5. Form of Agreement

a. Avoid an onerous form that looks like a complex legal document

b. Avoid legalese—in form, style and language

c. Use plain, clear, simple language that can be understood by someone with limited education

d. If have multi-lingual workforce agreement should be printed in various languages

6. **Special Considerations**

   a. Nature of employment relationship

      i. At will—much more leeway

      ii. Employment Agreement

         1. Need to review carefully

         2. Restrictions on employer's right to terminate

            a. If so, what is employer's obligation?

            b. Is there a basis for "cause" termination?

            c. Creative benefits as inducement to terminate contractual obligations

         3. If agreement provides for severance pay but does not include obligation of employee to execute release in exchange for severance, need to provide additional consideration for release

   b. Nature of employee's position—Executive/higher level/unique

      i. Transition assistance

      ii. Cooperation in investigations/litigation

      iii. Non-compete, non-solicitation

      iv. Confidentiality/non-disclosure

      v. Assignment of Inventions

   c. Stock options, ownership and other benefits

      i. Determine status of any stock options employee has, whether they are exercisable or, if not, what becomes of options at time of termination. Also determine whether employee owns any stock and whether stock may be retain or must be redeem, and procedure for doing so

      ii. Consult with attorney for proper handling

   d. Concerns regarding specific employee

B. AGREEMENT TERMS

1. **Termination Date**—Agreement should identify Termination Date

    a. Immediate termination or termination at later date?

    b. Continuation of employment for period

        i. What is expected of employee during period of employment?—Be clear

            1. Perform regular duties, or limited to transition of duties, responsibilities, information, etc., or no work is expected and employee is being placed on administrative leave

            2. If expected to perform some work, amount of time employee is expected to work, ie. regular hours and schedule, as needed, or otherwise

            3. Excused time off for job search

            4. To whom shall employee report and who is responsible for designating duties/assignments

            5. Address possibility of need to terminate prior to designated Termination Date due to:

                a. Employee's behavior, performance, etc.

                b. Company needs

                c. Be careful not to transform an at will employment relationship into to a contractual employment for a specific term with termination only for "cause" or stated reasons

        ii. Administrative Leave. May be a means to provide an additional benefit to employee, such as bridge to reach an early retirement benefit or to increase pension benefit

        iii. **Cessation of duties, responsibilities and authority to act on behalf of Company.** If employee is being placed on administrative leave and/or is being relieved of duties, responsibilities and authorities include a provision that explicitly states that effective immediately employee shall

cease to exercise and no longer is authorized to conduct any business or other activities or speak for or on behalf of company. Particularly critical for employees who are in positions of authority to act on behalf of employer.

iv. **Access to premises.** If want to restrict/limit employee's access to and/or presence on premises, may address in agreement.

v. **Access to systems**. Will employee have access to company computer, phone, network systems during period of continued employment, particularly if on administrative leave with no responsibilities?

1. Address how will be handled.
2. Concern—security and redirection of calls, emails, customers to appropriate personnel
3. Consult with IT re: security issues and monitoring of voice mail and email messages
4. Advise employee of monitoring needs and no expectation of privacy
5. Advise employee of restriction on use of systems
6. Limit employee's access, consider change of email/voice mail accounts
7. No continued access upon termination

vi. **Special release considerations**. If employee remains employed for period of time following execution of severance agreement and release, new claims may arise. Agreement's release will not cover such claims because cannot waive future claims.

1. Agreement should include provision that upon termination of employment employee signs a second release.
2. Need additional consideration for second release, such as severance payment after termination or other benefit.
3. Timing for execution and return of Second Release.

a. Second release should be included as appendix to Agreement so employee is made aware of its contents from outset.

b. Second release should provide that employee cannot execute and return release to employer until day following termination date. Set a deadline for return of executed release—i.e. no sooner than first work day following termination date and no later than specified number of workdays following termination date.

c. For waiver of age claims:

i. No need to provide a new Older Workers Benefit Protection Act ("OWBPA") consideration period at time of termination because employee had the release since time received agreement.

ii. Need to provide 7 day revocation period

2. **Withdrawal from Company positions.** If employee holds position in company, i.e. Board member, officer, include provision whereby employee agrees to voluntarily resign from position.

3. **Severance and/or Administrative Leave Payments**

a. **Amount of payment**

i. Administrative leave—if employment will be continued for period of time but employee is not regularly required to perform services

1. Factor into overall severance benefit

ii. Severance payment

1. Formula based on years of service v. set amount

2. Nature of position held

3. Special circumstances

b. **Timing of severance payment**

   i. Pay over a period of time or in a lump sum?

      1. tax consequences for employee

      2. cash flow for employer

      3. ability to limit loss in event of breach by employee

   ii. Agreement should provide no payment until agreement has been signed and returned, and any applicable revocation period has expired and no revocation has occurred—i.e. severance payments will commence on the first pay day following expiration of revocation period

   iii. Where agreement provides for continuation of pay over period of time, some employers do not want to stop the income stream to employees and do not condition continuation of payments on employee's return of a signed agreement and expiration of revocation. Problem arises if employee decides not to sign and employer already has paid employee—difficulty in recouping money

c. **Contingent payment.** Agreements sometimes provide that if employee obtains another job the severance ceases

   i. Contingency may act as disincentive to employee's job search

   ii. Can be counter-productive

   iii. Goal of both employer and employee should be for employee to obtain another position ASAP and move on

   iv. Recognize that employer may view continuation of severance payments to employee who has obtain another position and is receiving a paycheck "double dipping" or a windfall

   v. However, better view is to accept as "business cost"—cost of terminating the relationship and avoiding risk of litigation.

   vi. Thus, recommended that, in advance, employer determines cost it is willing to incur for employee's severance and not look back

vii. Where employer desires to have such provision, should include requirement that employee is obligated to conduct diligent job search and payment may cease if employee rejects a reasonable job offer

1. Difficulty in monitoring employee's job search and offers

d. **Tax Issues**. Gross or net of taxes. Agreement should state whether payments are to be gross or net of applicable taxes and other required withholdings.

i. If no withholdings agreement should state what the pay represents to provide basis for no withholding.

ii. Consider specifying an apportionment of payments between severance pay and for damages such as emotional pain/suffering/compensatory damages/attorneys' fees, and state in agreement that taxes, FICA and FUTA will be withhold from severance pay but not from other payment(s)

iii. Consult with tax attorney to ascertain whether can properly apportion and whether payment is subject to withholding

1. Attorneys representing employees frequently attempt to convince employers not to withhold. This can be a minefield for employers.

iv. If no withholding, include provision that employer makes no representations regarding taxability of payment and employee is responsible for any taxes, interest and penalties and agrees to indemnify employer for tax consequences.

v. Section 409A Implications

1. IRS Code Section 409A provides as follows:

"Deferred compensation" that does not comply with the requirements of Section 409A is taxable upon vesting (even if not then payable) and a 20% additional penalty tax applies. "Deferred compensation" for this purpose is defined very broadly under IRS regulations and as a general rule includes severance pay. To avoid adverse tax consequences, severance pay must be structured to either meet the requirements of Section 409A or qualify for an exception from its requirements."

2. Overview of Section 409A Requirements

    a. Material terms of deferred compensation are required to be set forth in writing

    b. Distributions of deferred compensation only may be made in the following permitted events:

        i. Fixed date or fixed schedule specified in writing

        ii. Separation from service

        iii. A six-month delay in payment rule applies to key employees of public companies

        iv. Death

        v. Disability

        vi. Change in control

        vii. Unforeseeable financial emergency

    c. Restrictive timing rules apply to elections to defer compensation.

    d. Restrictive timing rules apply to elections regarding the time and form of payment and elections to further defer the time of payment.

    e. Prohibits the acceleration of the time of payment, including any proviso in an agreement that gives the employer or the employee the discretion to accelerate the time of payment.

    f. Form W-2 reporting is required for the annual accrual of deferred compensation even if the compensation is not then taxable

2. Exceptions to Section 409A

    a. Short-Term Deferral Exception.

        i. Section 409A does not apply to deferred compensation payments made within 2 1/2 months

ii. In many cases, a severance obligation is only established at the time an employee is terminated following the negotiation and execution of an ad hoc severance agreement. In such a case, the severance "vests" at the time the agreement is made by the parties. Under the short-term deferral exception, Section 409A will not apply to an ad hoc severance agreement if all payments under the agreement are completed by the March 15th of the year following the year in which the agreement is made.

iii. If the right to severance is provided under a pre-existing severance plan or employment agreement, the severance generally will not "vest" until the employee incurs a termination of employment. In such a case, Section 409A will not apply if the severance is paid by the March 15th of the year following the year of termination.

iv. However, if the severance under the plan or agreement is available in circumstances in addition to an "involuntary termination," the right to severance may vest prior to termination of employment. Because vesting, and not termination of employment, starts the payment period for the short-term deferral exception, the short-term deferral exception may not be available to except the arrangement from Section 409A. In this regard, the IRS regulations recognize that a voluntary termination for "good reason" may constitute an involuntary termination in some circumstances. The regulations include safe harbor provisions under which a voluntary termination for "good reason" will be deemed to constitute an involuntary termination.

b. Exception for Certain Severance Payments. An exception from Section 409A is provided for severance payments to the extent:

   i. payments are available only on account of an "involuntary termination" and not for other reasons;

   ii. payments do not exceed two times the IRS annual compensation limit for qualified retirement plans ($490,00 for 2009) or two times the employee's annual compensation, if lower; and

   iii. payments are made no later than the end of the second year following the year in which the termination of employment occurs.

c. Six-Month Delay in Severance Payments to Key Employees of Public Companies

   i. In the case of a "key employee" of a public company, deferred compensation is not permitted to be paid earlier than six months from the employee's termination of employment.

   ii. A "key employee" generally is an officer with annual compensation exceeding $150,000.

   iii. However, under the IRS regulations, the six-month delay rule will not apply to that portion of severance payments that meet one of the exceptions described above, provided the severance agreement specifically provides that each payment under the agreement is to be treated as a separate payment under Section 409A.

4. **Benefits.** Be creative.

   a. **Continuation of Health Benefits**

      i. Continue on company insurance plan as employee during severance period

1. May run afoul of plan, so must check plan's terms

2. If do so, should state that COBRA rights will commence thereafter and COBRA notice will be sent to employee at that time, in accordance with COBRA requirements

3. Also, may include contingency that such health benefit continues provided that employee does not become eligible to participate in another plan

ii. Right to continue health coverage through COBRA

1. May provide as a severance benefit that if employee elects COBRA employer will pay a specified portion of COBRA premium obligation for a specified period

2. COBRA right without employer contribution (required for covered employees)—include statement in agreement and that COBRA information will be provided to employee in accordance with COBRA requirements

b. **Other insurance benefits**

i. Employer may choose to continue other insurance benefits such as life, disability, etc. at employer's cost for a period of time

ii. May provide employee with right to convert policy at his/her cost

c. **Company vehicle**

i. Leased vehicle. Consider providing an opportunity for employee to take over lease obligation and payment if permitted under lease

ii. Consider offering employee opportunity to purchase vehicle at a determined fair market value

iii. If not transferring vehicle to employee, need to get vehicle returned to employer immediately.

1. Serious liability issues

2. Provide for return in agreement and condition payment of severance and benefits on immediate return of vehicle (See below—return of property provision)

d. **Computer, BlackBerry, and other electronic devices**

   i. Provision allowing employee to keep or purchase computer, BlackBerry, mobile phone or other electronic device

   ii. If so, require employee to permit company to have device "cleaned" so confidential company information is not retained by employee

   iii. May be issue with software licenses—if software is restricted and remains on non-employee's computer. Need to check software licenses.

   iv. Telephones. Employee's retention of mobile telephone and/or telephone numbers of home office. Concern with employer losing customer contacts.

e. **Outplacement Services**

   i. Consider providing employee with outplacement services

   ii. Wide range of services and costs—consider what is appropriate given employee's position, tenure, and other considerations

   iii. May provide for an outplacement allowance that employee may use at outplacement provider of his/her own choosing—may or may not require company approval of provider and services selected

f. Include provision that employee is not entitled to any other compensation or benefits not specifically provided for in this agreement.

5. **Expenses.** Provide for payment of reasonable expenses incurred through date of termination, if authorized, consistent with company expense policy. Set deadline for submission of expense reimbursement request and receipts.

6. **Consideration.**

   a. Explicitly provide that the consideration being provided for in the agreement is beyond any that otherwise is or would be due the employee and is being provided to the employee for his/her execution of the agreement, including the release of claims (and any second release of claims provided for in the agreement)

b. If agreement includes a waiver of age discrimination claims under the Age Discrimination in Employment Act ("ADEA"), include "and particularly for employee's waiver any all claims under the ADEA and OWBPA"

    i. Does not mean that employer has to provide older employee with more benefits/pay than under 40 employee

7. **Return of Property Clause**
    a. Include a provision requiring employee to return all company property in employee's possession

    b. Make payment of severance pay and benefits (and perhaps administrative pay, depending on arrangement) contingent on satisfying obligation

    c. Set date for return of property—very short deadline

    d. Define property broadly and include documents and electronic documents and files, and any and all copies of any such documents and files. Employee is not to retain any copies of any documents.

    e. Computers and other electronic devices raise serious issues. Need to provide for not only return of electronic hardware, software, documents and files, but also a complete deletion of electronic files from any electronic storage devices employee may have. Consider including a provision authorizing employer to have representative access any computers and other electronic devices of employee to ensure that there is no retention of employer's information.

    f. Consider requiring employee to execute a statement representing that s/he has not retained and/or transferred to another any company information and electronic documents and files

8. **Transition Assistance**

    a. If expect employee to provide transition assistance as part of consideration for severance pay and/or administrative leave pay, include provision setting forth employee's obligation and that no additional compensation will be made for such transition assistance

b. Indicate that continuation of administrative leave period and/or severance is conditioned on cooperating in transition.

c. If agree to provide additional compensation for transition assistance, clearly state amount and terms.

d. May agree to specifically limit hours of transition assistance and for any hours in excess of pre-determined set hours employee will receive additional compensation. Be clear and set rate.

e. May include that assistance shall be required at reasonable times and with reasonable notice (concern if employee obtains another job that could impede on his/her ability to provide transition assistance), and employee must make him/herself available.

f. Try to limit amount of time spent on transition and complete ASAP

9. **Cooperation in Litigation and Investigations**

a. Requirement to cooperate with company (including being available to consult with and assist company attorneys) in any current or future litigation or investigations in which company is involved and about which, employee, by virtue of employment may have knowledge and information.

b. Employee agrees to provide truthful testimony, without need for a subpoena

c. Provision to reimburse employee for reasonable expenses incurred in providing such assistance, and require prior authorization by employer.

d. May also provide for reimbursement for time expended at reasonable rate.

10. **Restrictive Covenants**

a. Include provision reaffirming any applicable Restrictive Covenants

i. Serves multiple purposes—(1) reminder to employees of their post-employment obligations; (2) heightens importance of these obligations and employee's understanding that s/he remains obligated; (3) ensures that obligations are not being waived by agreement

ii. Agreement should state that: (1) employee acknowledges the obligations and understands the terms and restrictions and his/her obligations, (2) to date, employee has not violated the terms, continues to be obligated and will abide by the terms.

iii. Agreement should specifically incorporate the restrictive covenants and obligations in its terms and make said provisions a part of the agreement

iv. Agreement should further provide that nothing in the agreement shall be deemed to waive or modify or release the employee from those contractual provisions and the employee's post-employment obligations

1. Integration Clause (see below). Be careful in drafting so as not to void restrictive covenants previously entered into by the parties. Explicitly except restrictive covenants.

v. If agreement intends to modify any applicable restrictive covenant, should explicitly state the modification and include statement that all other restrictive covenants remain in full force and effect and are specifically incorporated in agreement and made a part thereof

b. Provide for new restrictive covenants

i. May be able to obtain via severance agreement post-employment non-compete, non-solicitation, non- disclosure obligations and other post-employment obligations that employee had not previously been bound to

ii. Need to comply with applicable state law regarding scope of enforceable restrictive covenants

iii. If provide for continuation of salary during restrictive period may be able to have broader non-compete than otherwise permitted

c. Assignment of inventions provision

11. **Confidentiality**

a. Include provision obliging employee to keep fact of and/or terms of agreement confidential

b. Provide exception permitting employee to discuss terms of agreement with spouse, financial advisor, attorney, and as may be required by law, but include a requirement that those persons are to be notified of and bound to confidentiality provision

c. Penalty for breach of confidentiality imposed on employee—deemed to be breach of agreement. See below under "breach of agreement."

d. Address what parties may say in response to inquiries regarding the matter, particularly if matter had been in litigation

12. **Non-Disparagement**

a. Employee agrees not to disparage employer or state anything that may reasonably be interpreted to disparage the employer, its officers, directors, shareholders, employees, agents, representatives and attorneys with respect to any matter

b. Mutuality—employees frequently ask for mutual non-disparagement clauses. If agree, be careful not to make obligation overly broad on employer—cannot control what individual employees may say

13. **No Admission of Liability.** Include provision that this agreement should not be deemed as an admission of liability by the employer and that agreement is inadmissible as evidence in any proceeding except to the extent necessary to enforce its provisions

14. **No Hire Provisions**

a. Provision that employee agrees not to apply for reemployment

b. Open issue as to whether provision can be deemed to be unlawful retaliation

c. Can create unnecessary negative reaction

15. **References**

    a. Employee make seek a positive reference and/or positive reference letter from employer

    b. Avoid providing a letter

    c. Concern about making untruthful statements

    d. Depending on circumstances, may be able to agree on statement that can used in response to reference request

    e. Designate specific individual/position to whom references should be submitted and who is responsible for providing reference (include proper notation in personnel file or other applicable company records to account for turnover in said position); Adopt company policy and strictly enforce policy regarding designated responsible individual(s) to provide references

    f. If company has neutral reference policy, concern about providing a reference that is contrary to policy

        i. Should agree to abide by neutral reference policy

16. **Communications regarding employee.** Provision regarding agreeable statement to be made within and outside company regarding departure of employee.

17. **Covenant not to sue**.

    a. Include requirement that employee covenants that s/he will not sue employer and will not encourage or assist others in filing suit against employer

    b. Need to ensure that provision is consistent with applicable law

    c. Should specifically exclude prohibition against filing of EEOC Charges, however, may include prohibition against seeking damages with respect to an EEOC Charge or action brought on employee's behalf by governmental agency

    d. May want to include affirmative statement by employee that s/he has not filed any claims and does not have any claims against the employer

e. If litigation has commenced, include provision providing for the filing of stipulation of dismissal with prejudice, and parties to bear own costs

18. **Release**

a. Release Coverage

i. Released Claims.

1. Determine whether to include a General release of all claims or to limit release to claims relating to employment and termination of employment (with specific exclusions, see below)

2. If General Release—state in bold and uppercase type: "**THIS IS A GENERAL RELEASE,** subject only to the exception provided for herein"

3. Release must clearly state that ADEA claims are being released

4. FMLA claims. New FMLA regulations provide that FMLA claims can be released

5. WARN Act. May waive future Warn Act claims may but consideration must be more than Warn Act notice period if is part of comprehensive release of claims

6. Unfair Labor Practice Claims under National Labor Relations Act. An employee can withdraw his/her ULP charge, however, if the Regional Director has issued a complaint, only the NLRB can determine whether to terminate the proceeding.

a. In such cases, agreement should provide that employee will seek dismissal by NLRB.

b. Should consider seeking prior agreement from NLRB

ii. Claims Prohibited from being released

a. Future Claims

b. EEOC Charges (see above). But, as noted above can prohibit employee from obtaining damages as result of

charge brought by employee or lawsuit by government on employee's behalf. Suggested provisions:

i. "Notwithstanding the foregoing, nothing contained herein shall prevent the Employee from filing an administrative charge of discrimination with the EEOC or state or local fair employment practices agency. The Employee agrees that he shall not seek, accept, or be entitled to any monetary relief, whether for himself individually or as a member of a class or group, arising from an EEOC charge filed by him or on his behalf. This Agreement prohibits the Employee's ability to pursue any Claims against the Released Parties seeking monetary relief or other remedies for himself and/or as a representative on behalf of others."

ii. "No Federal, state or local government agency is a party to this Agreement, and none of the provisions of this Agreement restrict or in any way affect a government agency's authority to investigate or seek relief in connection with any of the Claims. However, if a government agency were to pursue any matters falling within the Claims, which it is free to do, the Employee and the Company agree that as between the Employee and the Company, this Agreement shall control as the exclusive remedy and full settlement of all such Claims. The Agreement is a binding contract between two private parties—the Employee and the Company. Therefore, the Agreement affects the two parties' rights only, with no impact on any government agency."

2. Fair Labor Standards Act ("FLSA") claims

3. Unemployment claims

4. Workers Compensation waiver of future claims or benefits may be prohibited from release under applicable state law

5. Federal False Claims Act Amendments of 1986 grant individuals the right to bring suits if they know of wrongdoing in connection with government contracts

    a. Such "qui tam claims" may not be able to be released (unresolved issue)

    b. Some courts have held that it is contrary to the purpose of the law to bar the employee from bringing an action which is intended to protect the government against fraud

    c. Government contractors may want to consider including a representation by the employee that employee knows of nothing that would give rise to a qui tam claim

6. No unlawful restriction. Agreement should state that nothing set forth in agreement is intended or is to be interpreted as prohibiting the employee from exercising any right that under applicable law cannot be waived by the employee.

iii. Released parties

1. "Employer"/"Company" should be comprehensive to include parents, subsidiaries, related companies, benefit plans, related and all past, present and future officers, directors, shareholders, fiduciaries, employees, agents, other representatives, attorneys, assigns, and insurers

2. "Employee" should be defined to include heirs, representatives, agents, assigns and anyone acting or claiming to be acting on behalf of the employee

iv. State Law requirements. Review applicable state law for specific requirements for valid releases

19. **Remedy for Breach by Employee**

a. Terminates obligation to pay any remaining severance due employee

b. Tender back of monies already paid. Concerns:

i. ADEA—Cannot require tender back as automatic remedy if employee files suit, but can provide that if employee sues for age claims and court finds release void under OWBPA, employer can seek recoupment or setoff of amount paid

ii. Other breaches of agreement. Possible that a court may consider obligation to tender back all monies paid and cessation of any future payments to be a withdrawal of underlying consideration for agreement if no other consideration is provided for in agreement

c. Liquidated Damages. Specify percentage or specific amount employee is required to repay employer. Enforceability may be an issue.

d. Attorneys' fees incurred by employer to defend itself if employee sues in violation of release, provided employer prevails. Exclude ADEA claims.

20. **Governing Law**. Agreement should specifically identify the state law that governs the agreement

21. **Disputes regarding agreement**

a. Identify the specific jurisdiction and venue for resolution of disputes

b. Include employee's explicit consent to personal jurisdiction of courts, and waiver of specific service

c. Arbitration provision? If so, then must conform to applicable state law requirements regarding a valid arbitration agreement

i. Consider allocation of costs of arbitration

ii. Venue of arbitration

iii. Arbitration rules to follow

iv. Selection of arbitrator

v. Sufficiently limit scope of arbitrator's authority

22. **Integration clause**

a. Care should be given to broad integration clauses

b. Review employment relationship and documents—if other agreement(s) exist consider whether intend to have severance agreement supersede such agreement(s). If intent is to have provisions of other agreement(s) survive specifically state.

23. **Severability**

a. Determine whether to include severability provision—if court determines any provision of the agreement is unenforceable, that provision is severable and all other provisions of the agreement remain in full force and effect

b. Are there any provisions that go to the essence of the agreement, i.e. the release, that employer may not want to have severed from agreement, leaving other terms, including obligations to employee, intact?

c. Take care in drafting severability provision to consider implications and effects

d. May choose to make essential provisions non-severable

24. **Review of Agreement**

a. Review period required under OWBPA (21 or 45 days) to permit employee to consider agreement before signing and returning

b. Check applicable state law to ascertain whether state has any review requirement

c. Even if not required, advisable to provide some reasonable period to review/consider agreement prior to signing—recommend at least 10 days

d. Explain in agreement that employee is not required to wait the entire review period and can sign and return at any time within the period

25. **Revocation Rights**

a. OWBPA provides that for a release of ADEA claims to be valid employee must be given 7 days after signing to revoke his acceptance of agreement

b. No revocation requirement for any other federal claim

c. Need to determine whether applicable state/local law provides for any revocation period

d. Explain that employee cannot waive and employer cannot reduce revocation period

e. Agreement should provide that no severance pay and benefits shall be paid or commenced until revocation period has passed and no revocation has occurred

f. Provision should explain that revocation must be in writing and should identify to whom, how and when it should be delivered to be effective

26. **Knowing and voluntary execution by employee**

a. Employee has been advised of right to consult with lawyer of his/her own choosing and encouraged to do so

b. Employee is not relying on representations of employer or employer's representative or lawyer

c. Employee understands and acknowledges that the agreement is legally binding and may adversely affects his/her legal rights, and s/he is entering into agreement of his/her own free will and intends to be legally bound

e. Drafting. Agreement not to be construed against the drafter or, where applicable, Employee participated in the drafting of the agreement.

27. **Assignment of Agreement**

a. May provide for assignment of the agreement by employer. Specifically state

b. Agreement should prohibit employee from assigning any of his/her rights and/or obligations under the agreement

28. **Subsequent Changes to Agreement.** Provide all changes must be in writing and executed by all parties to the agreement

29. **Notice.**

    a. Provide that any notices required to be given under agreement shall be to given to address provided for in agreement or employee's last known address, and employee has obligation to provide employer with any changes in address or contact information

    b. Provide for form of notice

    c. Provide for acceptable delivery methods (hand delivery, U.S. mail, commercial services, facsimile, etc. and provide for delivery confirmation

30. **Counterparts.** Provide that agreement may be signed in counterparts