FROM THE CRADLE TO THE GRAVE: 
DRAFTING AND COMMUNICATING 
EMPLOYEE AGREEMENTS

Exit Agreements

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Employee/Employer Exit Agreements

I. INTRODUCTION

Many employees now exit an employment relationship with an agreement documenting the terms of that exit. For some time now, executive employees have reviewed and executed employment contracts upon hire, and they often execute agreements as they leave an organization as well. Increasingly, employees below the C-suite are being presented with separation agreements for a number of reasons — e.g., group layoffs in which severance is offered to all affected employees; situations in which employees individually negotiate their separations in exchange for a release of claims; or when companies, as a matter of policy, provide severance to departing employees with an accompanying written separation agreement.

Every separation agreement is different. Below is a checklist of clauses that could be included in an exiting employee’s agreement. This list is not meant as an outline of what should be included in every agreement. In fact, these clauses should not necessarily be in each and every separation agreement, but consideration of these issues may be helpful as the employer and employee consider the end of an employment relationship. Copies of various separation/severance agreements are attached for review.

II. CHECKLIST OF KEY SEVERANCE AGREEMENT CLAUSES

A. Release of Claims

1. Consider whether the release will be mutual.

2. Consider the scope of the release — whether global (releasing all claims that could have been brought as of the date of settlement) or limited (releasing the claims made in a particular lawsuit or charge).

3. A release typically includes a variety of actors in addition to the parties (e.g., officers, directors, employees, insurers, agents of the corporation). Experienced counsel take care not to use the “releasee” designation in other clauses of the separation document where such a broad listing of actors can be harmful to both parties.

4. Release one/release all issue. In some states, the release one/release all common law rule still exists or has been abrogated by statute, in whole or in part. It is important for both parties to understand what claims are being released, and if the common law

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1Because this paper is a checklist for all separation agreements, it does not address exiting executive employees. Consequently, neither the specifics of tax issues (e.g., I.R.C. Section 409A) nor every benefit issue are outlined here. For an in depth evaluation of exiting executive agreements, counsel should review “Representing the Executive,” Wayne N. Outten, Executive Compensation Library on the Web, Executive and Director Compensation Reference Guide (BNA 2007).
rule applies to the claim and release one/release all is not intended, then the agreement should so state.

5. Releases which seek to release future rights or claims are unenforceable. E.g., Feltmeier v. Feltmeier, 207 Ill.2d 263, 286, 798 N.E.2d 75 (2003) (release of all claims that might arise between the parties would plainly be “against public policy”).

6. By law, some rights cannot be released.

7. Consider whether two releases will be necessary. For example, the parties may wish a release to be executed at the time of the agreement, but the employee’s separation may not occur until later, at which time a second release may be necessary.

B. Dismissal of Suit or Withdrawal of Charge

1. If a separation/severance agreement arises after suit is filed, then the agreement should state that the parties will file a stipulation of dismissal with or without prejudice; with or without leave to reinstate original suit; or retaining or not retaining the court’s jurisdiction over the settlement. Kokkonen v. Guardian Life Ins. Co., 114 S. Ct. 1673 (1994) (ancillary jurisdiction over a settlement agreement is proper if the district court made the terms of the settlement agreement part of the order of dismissal, either by separate provision or by incorporating the terms of the settlement agreement in the order).

2. If the agreement arises after a charge is filed with an investigative agency, then the agreement should state that the employee shall file a withdrawal of the charge with that agency.

3. The employer should be advised that withdrawal of the individual employee’s charge does not necessarily eliminate the agency’s ability to proceed.

C. Covenant Not to Sue

1. A promise that no suit will be filed or initiated for claims released in the separation agreement may be important, depending on the circumstances. Care must be taken not to create ambiguity. See Don R. Livingston, Twelve Pitfalls with Separation, Waiver and Release Agreements, ABA Section of Labor & Employment Law 2009 Annual CLE (Nov. 6, 2009) (outlining the problems with covenants not to sue and releases in the same documents and solutions).
2. EEOC Guidance states that obtaining a promise from an employee not to file a charge or assist in Commission investigations constitutes unlawful retaliation in violation of federal employment rights statutes. EEOC Enforcement Guidance on Non-Waivable Employee Rights Under EEOC Enforced Statutes (April 1997); see also 29 C.F.R. §1625.22(a)(2).

3. A challenge to a release may not be subject to a covenant not to sue. See 29 C.F.R. §1625.23(b) (disallowing any waiver of an employee’s right to challenge the validity of the release through a lawsuit).

D. Consideration or Severance

1. Monetary Payments
   a. Is the payment to be made in a lump sum or over time?
   b. Lump sum payment(s) and payments over time may be in the same agreement. A variety of factors will affect payment structure, such as cash flow issues (this may require bonding or collateral protections) and the timing needs of the employer or employee. For example, negotiations may have delayed payments that were to begin at termination of the employment relationship, and a lump sum catch-up payment from the date of separation is therefore required. Alternatively, a lump sum payment can be made to the employee’s counsel while payments over time are accepted by the employee.
   c. Specifics of each type of payment must be in the agreement: specific date on which payment is due (8 days after employee signs is typical); method of payment (direct deposit, check, wire transfer); to whom any check is made payable; where the check is to be delivered; and whether the amounts paid should have taxes withheld. If more than one check is involved, these procedural details should be included for each payment.
   d. Specify how the payments will be reported for tax purposes (e.g., W-2 or 1099-MISC {Box 3, “Other Income”}).

2. Health Insurance Benefits
   a. If the employer is providing health insurance benefits under a group policy for a period of time before the employee
begins coverage under COBRA, the agreement should so state. In such instances, it is helpful for the employer and the employee to state when COBRA informational documents will be provided to the employee.

b. COBRA payments. COBRA premiums are often paid by the employer, and the agreement should state whether the employer will pay the COBRA costs directly or whether the employer will be reimbursed for the cost of these premiums. The amount of the payment or the number of months to be paid for by the employer should be specified.

c. Other insurance premiums. Besides health insurance, employers may also provide their employees with other types of insurance, such as life and disability. These insurance issues may need to be addressed after the employment relationship ends. An employer may agree to continue to finance these benefits for the employee or simply notify the employee of any conversion rights under those policies.

3. Vacation Pay

Vacation pay should always be included in the agreement and should state specifically what amount is being paid. (Check any state law requirements.)

4. Equity

a. Equity benefits come in a variety of shapes and sizes — stock options, restricted stock units (“RSUs”), phantom stock, stock appreciation rights (SARs). At the outset of discussions, an employee’s counsel should request copies of all plan documents if his client does not already have them. Some employee counsel may also work with benefit counsel on these issues.

b. Cash value for these benefits can be negotiated.

c. The parties can also consider negotiating plan eligibility requirements, vesting and execution deadlines, or approving discretionary determinations that plan requirements are met.

d. Buy-back situations may also exist, in which case any procedural requirements should be examined and valuation/timing issues addressed.
5. **Deferred Compensation/Supplemental Executive Retirement Plans**

Counsel should review the plans governing these benefits.

6. **Pension/Retirement Benefits**

   a. The employee’s rights under his/her pension or retirement plans should be addressed by both employer and employee. Counsel will want to address a variety of issues in the negotiations – e.g., the effective date of the agreement or characterization of the employee’s departure from employment.

   b. Typically, most agreements state affirmatively that any release does not apply to “any right to vested or accrued benefits under any employer-sponsored plan in which the employee participates.”

7. **Outplacement**

   a. Sometimes outplacement services are offered as part of a departing employee’s package.

   b. Consider whether outplacement or cash in lieu thereof is more appropriate.

   c. If outplacement is part of the severance package, consider who will provide those services. The employee should also understand what services are being rendered (what does the “premium,” “executive,” “standard” package include) and how long those services will be provided.

   d. Office and support services are sometimes provided as part of an outplacement package. If not, they can be negotiated separately.

8. **Company Car**

   a. Is the car to be returned to the employer? Is purchase or lease of the car to be negotiated?

   b. Is a car allowance to be continued and, if so, for how long? If gas or insurance is handled separately from the lease, specify those issues as well.
9. **Relocation Agreements**
   a. Does the employee need to relocate back to his/her hometown from overseas or a location away from home? Did the employee recently relocate, and is the employer paying relocation costs for either the new or former residence?
   b. Any relocation repayment requirements are generally waived if the employer terminated the employee’s employment.

10. **Tuition Assistance**
   a. In many instances, an employer will assist its departing employees with re-training classes or tuition. This can be set forth as a specific dollar amount or number of classes or semesters.
   b. If a tuition assistance policy exists, it should be reviewed, although exceptions can usually be made.

11. **Partnership Interests**
    Handling these issues requires review of the partnership agreement.

12. **Expense Accounts**
    Employee counsel should advise his/her clients to submit all expense reports immediately. Consequently, this issue will be resolved before any separation agreement is completed. If not, the agreement should state the amount and timing of any expense account payments.

13. **Bonuses**
    Separation agreements should specify the amount and timing of any bonus payments. Bonuses for more than one year are often at issue, so each bonus should be addressed separately. Similarly, more than one bonus plan for each year may be at issue and should be addressed separately.

14. **Sick Leave**
    Accumulated sick leave may be paid to the employee in a lump sum upon departure. The amount and timing of the payment should be stated in the agreement.
15. **Commissions**

a. This is often a difficult issue during negotiations. Employees often believe they were let go so as not to be paid their earned commissions. Employer plans are often late or vague, and calculations underlying commission determinations are often clouded with assumptions and lack of transparency.

b. Once an agreement is reached, specify in the separation agreement what amount will be paid and when it will be paid. Avoid inexact or descriptive explanations of the commissions to be paid (e.g., “commissions on the X, Y, Z sales”). These will simply lead to litigation.

E. **Confidentiality**

1. The confidentiality clause in the separation agreement should be mutual. Both parties have an interest in keeping the terms confidential.

2. Standard disclosure exceptions are the employee’s family (which family members are to be included in this designation will be affected by the actors involved prior to any settlement/separation discussions), professional advisors (attorneys, accountants, financial or tax planners), tax or regulatory authorities, any proceeding regarding the severance/separation/settlement agreement, and if required by law (e.g., subpoena). An employer’s objection that it cannot assure confidentiality is avoided by instructing all those involved in the matter or who are required to effectuate the terms of the agreement that they must maintain confidentiality.

3. When a request for confidentiality is not presented until near the end of negotiations, a request that all negotiations be subject to a confidentiality provision is not appropriate.

4. The parties may wish to anticipate questions as to how the matter was concluded. Often, a standard response such as “the matter has been resolved” is required of the parties.

5. Some employers want a settlement agreement to be non-discoverable in future litigation. If this is requested, then the employee should make the employer shoulder the burden of resisting discovery. Some employees’ attorneys do not entertain such clauses. Corboy, “Secret Settlements,” 122 Trial (June 1993).
6. Because settlements with government/public employers are funded by tax dollars, they may not be private as a matter of state or local law. Check local or state law.

F. Liquidated Damages and/or Injunctive Relief

1. Employers and employees alike sometimes wish to include a liquidated damages provision to incentivize adherence to the promises made (e.g., maintain confidentiality, sue on a released claim, etc.).

2. If such a request is made, either party should expect that the liquidated damages disincentive will be sought by the other party as well. Sometimes, once this is realized, the issue of liquidated damages is dropped.

3. If a liquidated damages clause is included, the parties should consider limitations on the amount of liquidated damages, notice, and opportunity for cure provisions.

4. The parties should not propose or agree to a high dollar figure. Liquidated damages will be denied when the stipulated amount is so extravagant or so disproportionate as to show fraud, mistake, or oppression. E.g., Raymundo v. Hammond Clinic Ass'n, 449 N.E.2d 276, 283 (Ind. 1983).

5. An employer may also wish to include a clause outlining injunctive relief for breaches of restrictive covenants.

G. Characterization of Employee’s Departure

1. As part of the reference letter or neutral reference, the parties will sometimes agree to include a reason for termination of employment.

2. The separation documents can simply state that the employment relationship has terminated, without giving a reason. Sometimes, however, a reason is stated. It that is the case, reasons for leaving — such as reduction in force, reorganization, restructuring, new management team, merger, workforce adjustment, or pursuit of other opportunities — may be identified and agreed to by the parties. If a characterization of the employee's departure is to be stated, the parties should consider whether that characterization will have an impact beyond the separation document. Care should be taken regarding the designation of an employee’s exit as a resignation; this may have a negative impact on benefits or applications for unemployment benefits.
H. References

1. The information about the employee that is to be disseminated by the employer after the employee’s separation should always be specified in the agreement.

2. If employers agree only to a neutral reference, then the agreement should state that this is all the information to be given out by the company. (This will avoid problematic situations — for instance, when an employer responds to the question of whether the employee is eligible for rehire, potentially turning the neutral reference into a negative reference.) If a neutral reference of objective facts is to be given, the parties should confirm or itemize the specific facts (length of employment, title held, etc.) in the agreement so that accurate neutral information is provided.

3. If a positive letter of recommendation is to be provided, its terms should be negotiated, a signatory named, and a copy included as an exhibit to the agreement, with the original letter of reference on company letterhead delivered with the executed agreement. See Duffy v. Oregon Glass Co., 2008 WL 1925038 (D.Or. 2008) (where the separation document promised a reference letter but did not elaborate on the content, the court found that whether there was a breach depended upon the “objectively reasonable expectations” of the parties and whether the letter met those expectations; questions of fact to be decided by a trial.)

4. When a positive letter of reference is provided, the agreement often states that if any oral references are given, they must be consistent with the contents of the reference letter.

5. The parties can consider other safeguards. First, the reference provision in the agreement can specify who is to provide references for the employee. The name and title of the person giving the reference should be specified, with a statement that the successor to the position will respond accordingly if the originally named employee later leaves the company. Second, the employer can agree to instruct certain individuals that they will not respond to inquiries regarding the departing employee, but will refer those inquiries to the specified responding individual.

I. Restrictive Covenants

1. Restrictive covenants can include garden leave clauses, confidentiality clauses, nondisclosure agreements, non-solicitation of employee clauses, noncompete clauses, or non-solicitation of business (an indirect noncompete clause).
2. If restrictive covenants are permitted (check state law), some employers ask that they be included in the separation agreement. If the restrictive covenant becomes part of the agreement, the clause must be narrowly and precisely drawn. Requests that are unreasonable (check state law) will not be enforceable (or, in certain states, will be “blue-penciled” – limited by the court). Most employees are offended by such requests that arise for the first time when they are leaving an employer. Employees will more favorably consider restrictive covenants if they are given severance pay for the same length of time.

J. OWBPA Notifications (and any similar state procedural notice requirements)

1. The OWBPA lists seven factors that must be satisfied in order for a waiver of ADEA claims to be considered “knowing and voluntary”:
   a. Written in a manner clearly understood.
   b. Specifically refer to ADEA rights or claims.
   c. Advise in writing to consult an attorney before accepting the agreement.
   d. Provide at least 21 days to consider the offer (the 21 days runs from the final offer; if material changes are made, the 21 days starts over).
   e. Provide seven days to revoke signature.
   f. Waiver cannot include rights and claims that may arise after the date on which the waiver is executed.
   g. Must be supported by consideration in addition to that to which the employee is already entitled.

2. If a release of claims in a separation agreement is part of an exit incentive, it must comply with the OWBPA and its regulations. 29 C.F.R. §1625.22(f).

3. Although courts have concluded that failure to meet OWBPA requirements does not support a separate suit based on violation of OWBPA regulations, failure to comply with OWBPA safeguards would be evidence in any underlying ADEA litigation.
K. Unemployment Benefits

1. An employer cannot promise that an employee will receive unemployment benefits because that determination is made by a third party.

2. However, it is not uncommon for an employer to agree that it will not contest any application for unemployment benefits.

L. Return of Property to Employer/Employee

1. Employees sometimes exit an employer before collecting all of their belongings. If that is the case, return of their property may have to be included in the agreement if it is not worked out before negotiations have ended.

2. Employers sometimes seek return of company property or a statement verifying that any such property has been returned.

3. A clause in the separation agreement that every document produced will be returned is overly broad. A well-drafted clause will provide that physical property will be returned (if not retained by the employee as part of the separation package) and that confidential documents will be returned.

M. Application or Rehire Prohibitions

1. When an employee has raised claims against an employer, the employer may seek to preclude the employee from applying for employment with the company in the future.

2. Because the rationale for such a request is to eliminate the possibility of a future retaliation claim, if such a clause is accepted, the employee may wish to limit it by time (e.g., bar application for rehire for one year), location (e.g., the Illinois office), or by corporate entity (e.g., the corporate entity that the employee is leaving).

3. Typically, if the employee’s future employer is merged with or acquired by his former employer, exclusion of any impact on the employee is included in the terms of the agreement.

4. Care should be taken not to include the broad “releasee” definition used in the release clause in this paragraph. An employee will not agree to be barred from applying for a position with the very broad universe of entities or individuals included in the release paragraph, such as every corporate entity “affiliated” with his former employer.
or “its lawyers, officers, directors, etc.” Such sloppy drafting does
not benefit either the employer or employee. The employee will not
accept such a broad prohibition and the employer will create a
record that it does not enforce the provisions of its contracts when
it cannot monitor whether the broad prohibition is adhered to, which
can undermine its ability to enforce such clauses in the future.
Better to simply ask for what the employer really wants in most
cases — that the employee will not return to work in the facility in
which he or she was employed at the time of separation.

N. Indemnification

1. The parties may wish to indemnify the exiting employee or include
a statement that he/she will be provided with the protections given
under the company's previously existing indemnification promises.
This will assure the employee that indemnification will be provided
if predetermined conditions for it are met. It will confirm for the
employer what indemnification protections will be provided.

2. An employer may sometimes request indemnification with respect
to the tax treatment of any payments with any taxing authority.
While such indemnifications are often provided by the employee for
his or her tax reporting obligations, the employee should take care
to shoulder only his/her share of any tax burden. For example, an
employee would not agree to shoulder the employer’s share of any
payroll taxes if a taxing authority subsequently determined that such
taxes were due.


If an employee is eligible for Medicare, the employer and employee have
potential responsibilities. Consequently a Medicare Secondary Payer Act
clause will be required in any agreement.

P. End of Employment

Both parties’ interests are protected by specifying the date upon which
employment ends.

Q. Choice of Law — Governing Law

The agreement should identify the law that governs the agreement.

R. Effective Date of the Agreement

Because other actions usually run from the effective dates of employment,
the effective date of the agreement should be stated therein.
S. Signature in Counterparts

Where appropriate, it is important to indicate that the agreement may be signed in counterparts.

T. Assignment of Claims/Heirs

It may be important to identify whether the agreement may be assigned to another individual or entity. It may also be helpful to include a clause that the benefits of the agreement pass to heirs.

U. Dispute Forum and Jurisdiction

1. The court or forum that has jurisdiction over disputes concerning the agreement may be specified. If an arbitration forum is requested, care should be taken to include the requirements for an enforceable arbitration clause under current caselaw.

2. Increasingly, parties are also agreeing to initial mediation of any disputes.

V. Cooperation Clauses

1. An employer may seek future cooperation with a lawsuit, claim, or regulatory matter about which the employee has knowledge.

2. If the employee wishes to provide such cooperation, the promise to do so has attendant requirements, such as (a) it will be provided under mutually reasonable circumstances, or outside business hours, or up to a limited amount of time; (b) negotiation of per diem or per hour compensation; (c) reimbursement for all expenses; and (d) payment of legal fees incurred by the employee.

W. Consultancy Specifics

1. The employer and employee sometimes decide that the employee will continue to provide some services after his or her termination. Any consultancy agreement should be in writing and can either be part of the separation agreement or a separate agreement executed at the same time. A written consultancy agreement assists the parties by documenting that an independent contractor relationship exists.

2. If becoming a consultant is part of the exit deal, that agreement should be drafted and executed at the same time as the separation
agreement. This will reduce the likelihood of unfulfilled promises of consultancy.

3. A consultancy agreement, like an employment contract, requires specificity of the work to be performed, rate of pay, and documentation of an independent contractor status (review factors examined by government agencies). In order to assure that services will be provided/requested, a minimum amount of pay/work is often specified for a set period of time.

X. Severability

Depending on the agreement, the parties may want to include a clause that if one provision of the agreement is declared invalid, the remaining provisions will remain enforceable.

Y. Non-Disparagement

1. A request for a non-disparagement provision in the agreement will be met with a reciprocal request. Parties should consider this before making such a request.

2. Many experienced counsel view such a clause as problematic for both sides given that non-disparaging conduct is undefined. Therefore, they generally eschew such clauses, relying on other preexisting legal protections (i.e., defamation or libel claims).

Z. Attorneys’ Fees

If the agreement provides that attorneys fees will be paid in the event of a finding of a breach of the agreement, then the provision should apply to both parties, and the clause should state that fees will be awarded against the non-prevailing party upon determination by a third entity such as a court or arbitrator.

AA. Modification of Agreement

1. Typically, the agreement states that all of its terms are contained therein, that no oral representations or promises are enforceable, and that any modifications must be in writing.

2. If such language is included, parties should not be surprised if an oral assurance that a certain benefit will be forthcoming or a policy will be followed is met with the requirement that such oral assurances must be stated in the agreement itself.
BB. No Admission of Liability

1. Sometimes a clause is included which provides that an employer is not admitting liability by signing the agreement. In certain circumstances, such a clause will be included for the employee as well.

2. Statements made during negotiations are another matter. While statements made in settlement negotiations are generally inadmissible under federal law (Fed R. Evid. 408), the parties should examine state law as well. E.g., Skonberg v. Owens-Corning Fiberglass Corp., 576 N.E.2d 28 (1st Dist. 1991) (evidence of settlement offers is ordinarily inadmissible, but admissions of fact are not excluded simply because they are made in the course of negotiations).

CC. Other Clauses

The variety of statements or clauses in an agreement can be endless. For some parties, it is important to include a number of other statements, such as that a representation in the agreement has a "binding effect" on the signing parties or that there is consideration.

III. CREATIVITY AND FLEXIBILITY

While this checklist outlines a variety of issues and options to consider, it is not exhaustive. It is important for employee and employer to retain creativity and flexibility.