

Navigating Mutual Separation Agreements: When And How?



In certain circumstances, a “mutual separation” may be the right fit to effect an individual’s cessation of employment.

What is a mutual separation?

A mutual separation, also referred to as a “mutual exit” or “retirement agreement” is a mutually agreeable arrangement between an employer and employee providing for, among other things, the cessation of the employee’s employment. The terms in a mutual separation agreement are negotiated prior to the actual cessation of employment.

Advantages of a mutual separation

For an employer, there are several advantages of utilizing a mutual separation agreement.

First, a mutual separation agreement provides an employer and employee with *flexibility*. With a mutual separation, there is an opportunity to collaborate with the employee on the terms of their separation. In the context of succession planning this is particularly beneficial, as a mutual separation agreement can set out a mutually agreed upon timeline for transitioning responsibilities and/or training replacements providing a clear route forward with certainty for both parties.

Second, a mutual separation gives *both* parties *agency*. A unique benefit of a mutual separation is that the employee has the chance to provide input regarding the terms of their departure. In the right circumstances, this deescalates difficult conversations and allows the employer to grant employee requests that are meaningful to the employee, easy for the employer to give, and otherwise unavailable in a unilateral termination (e.g. when, how, and to whom the cessation of employment is communicated).

Third, a mutual separation agreement is *proactive*. An employer can have an amicable discussion with an employee regarding the cessation of their employment before a legal claim crystallizes (i.e., before a termination occurs). Working with an employee to discuss their separation compensation *before* they’ve been informed of a unilateral decision to separate, (which can significantly weaken the relationship between the parties) helps eliminate misunderstandings regarding entitlements,

reducing legal expenses for both parties.

Finally, a mutual separation results in *finality*. Pursuant to a mutual separation agreement, an employer will typically require a departing employee to sign a release – following the effective date of the separation – in exchange for the employer providing the employee with compensation. By signing a release, the employee is giving up their right to advance employment-related claims in the future, and the employer avoids the risk of wrongful dismissal, human rights, or other related litigation.

Disadvantages of a mutual separation

A mutual separation is a unique approach and will not be the right fit in all circumstances. Two of the most crucial factors for determining whether a mutual separation is a good fit for a particular situation are: the employee's personality and whether the employer has an individual on their team that has a strong enough relationship with the employee to broach what can be a difficult conversation.

Raising a potential mutual separation is irrevocable. A conversation proposing a mutual separation cannot be undone and it can significantly impact morale if the employee is not amenable. Further, these discussions can make an employee feel they are being forced out, leading to a civil claim alleging constructive dismissal and/or a human rights complaint alleging discrimination. Employers should ensure that it is abundantly clear throughout any discussion of a mutual separation that the mutual separation agreement is optional and is not a *fait accompli*.

Mutual terminations are a powerful and useful tool in many situations. However, they must be implemented carefully. Before attempting to implement a mutual separation agreement, it is advisable to consult with legal counsel on a case-by-case basis to consider the associated legal risks. For further information, please contact any of the members of the DLA Piper (Canada) LLP Employment and Labour Group listed [here](#). We would be pleased to provide any assistance as may be necessary.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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