Termination: Avoid 5 Pitfalls in Settlement & Release Agreements



What's At Stake

Litigation is fraught with risk, unpredictable, wasteful, distracting and very expensive—even when you win. That's why most employment disputes end in settlement rather than judgment. You pay out a negotiated sum of money in exchange for being able to turn the page knowing that the employee (or ex-employee) has agreed to drop the case and "release" you from future claims. But like any other strategy, settlement is all about execution, namely, drafting the right settlement or severance agreement. Here are 5 common pitfalls that can cause your settlement to go wrong. Click here for a Model Severance Release.

1. Getting Employee's Agreement Simply to "Dismiss" Claims

Pitfall: When negotiating a settlement with an employee that's suing you, the first order of business is to get the lawsuit dropped. Boilerplate releases typically do this by getting the employee to agree to the "dismissal" of the claims involved in the suit. The problem is that claims that are dismissed can be filed again.

Solution: Get the employee to agree not simply to dismissal but dismissal with "prejudice." This will ensure complete closure because claims that are dismissed with prejudice are completely extinguished and can't be filed again.

2. Failing to Bar the Employee's Other Claims

Pitfall: When facing litigation, employers may inadvertently get a release covering only the immediate claims involved in the lawsuit and overlook other claims that may be brought in separate cases later on.

Example: Settlement of employee's employment standards suit for termination notice doesn't say anything about and thus doesn't release employer from a claim for pregnancy discrimination, the BC Human Rights Tribunal rules [*Wang v. Petit Couture Nail Salon and another*, 2019 BCHRT 180 (CanLII)].

Solution: Get a general release covering "any and all claims" against you, not a specific release covering just the claims involved in the current litigation. Do the same when negotiating severance agreements where no litigation has been filed or threatened.

3. Limiting Release to "Employment-Related" Claims

Pitfall: Another problem with boilerplate language is that it releases employers from claims related to the employee's employment and termination. But recent courts have interpreted this language as not barring claims for harassment, bullying, intimidation and other forms of misconduct. The reasoning: Being the victim of such behaviour is a different kind of animal that's not connected to employment even when it occurs in the workplace.

Example: Employee's release of any and all claims that "arise out of or which are in any way related to or connected with my employment or the ending of my employment" doesn't cover sexual harassment which Ontario court finds are "clearly separate matters" [*Watson v. The Governing Council of the Salvation Army of Canada,* 2018 ONSC 1066 (CanLII)].

Solution: Ensure the release expressly says that it covers claims arising from sexual misconduct, discrimination, bullying, intimidation violence and harassment and other behaviours and events deemed to be separate from the employee's employment relationship.

4. Not Protecting Your People

Pitfall: Getting the employee to release just the organization the way some boilerplate settlement agreements do leaves the principals of your organization unprotected.

Solution: Get the employee to release not just the organization but "related parties," defined broadly to include:

- The organization's corporate parents, affiliates and subsidiaries;
- Each of the above's "respective directors, officers, owners, agents, representatives, servants and employees"; and
- Their respective "predecessors, successors, assigns and heirs."

5. Offering Benefits to Which Employee Is Already Entitled

Pitfall: Release and severance agreements are unenforceable if all the employee receives in exchange are benefits to which they're already legally entitled. Contract law, 101: A promise isn't legally binding unless the person who provides it receives "consideration," i.e., something of real value in exchange. Accordingly, it's illegal to make payment of termination notice, severance, vacation pay and other amounts you're legally required to pay anyway on the employee's agreement to sign the release.

Example: Ontario court says employer took advantage of 63-year-old employee of 20 years by offering him just 2 days more than his ESA termination notice and leading him to believe that he wouldn't get a dime of notice if he didn't sign the release [*Rubin v. Home Depot Canada, Inc.*, 2012 ONSC 3053 (CanLII)].

Solution: If you base consideration on termination notice or other legally-owed payments, make sure you offer substantially more than the required minimum and that employees understand that they're entitled to the owed amount even if they don't sign the release.