THE COLLEGE OF
LABOR AND EMPLOYMENT LAWYERS
11th Circuit Regional Program

Cynthia N. Sass, Esquire
Law Offices of Cynthia N. Sass, P.A.
601 West Dr. Martin Luther King Jr. Boulevard
Tampa, Florida 33603
(813) 251-5599
www.employmentlawtampa.com

SETTLEMENT AGREEMENTS[1]

Important considerations exist when requesting employees to sign waivers and releases of claims:

1. **Use**. If done properly, the primary use of a waiver and release is to have an employee or former employee waive any and all legal claims against the employer and limit liability if the employee signs and accepts same. However, the agreements may be used for other reasons:
   a. **Not Enforceable**. If the waiver and release agreement is not drafted properly, the waiver and release may not be binding and the employee could still sue;
   b. **Evidence of Discrimination**. The agreement can be used as evidence if not consistently given to employees. For example, it may be evidence of discrimination if female employees are given releases to sign, but males are not;
   c. **Illegal Activity**. It could be used to demonstrate illegal activity, such as prohibiting whistleblowers from reporting violations to appropriate government authorities; or

[1] The following material is intended to provide information of a general nature concerning the broad topic of employment law. The materials included in this paper are distributed by the Law Offices of Cynthia N. Sass, P.A., as a service to interested individuals. The outlines contained herein are provided for informal use only. This material should not be considered legal advice and should not be used as such. Thank you to Yvette D. Everhart, Esquire, of the Law Offices of Cynthia N. Sass, P.A. for her assistance in preparing these materials.

d. **Prior Agreements.** It may invalidate prior existing agreements, if there is language stating that the release supersedes all prior understandings and agreements.

2. **Legal Considerations**:

a. **Enforcement of Executed Release**. Generally, releases are upheld as valid and will bar existing claims.

b. **Knowingly and Voluntarily**. The standard in evaluating whether a release is enforceable is whether the employee signed the release knowingly and voluntarily.

1) To be bound by an agreement waiving Title VII claims, an employee must have signed the release knowingly and voluntarily with a full understanding of the terms of the agreement. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15, 94 S. Ct. 1011, 1021 n.15, 39 L. Ed 2d 147, 160 (1974); *see also Paylor v. Hartford Insurance Company*, 748 F.3d 1117 (11th Cir. 2014).

2) Courts look to the totality of circumstances when determining whether a release was executed knowingly and voluntarily. *Paylor v. Hartford Insurance Company*, 748 F.3d 1117 (11th Cir. 2014); *see also Beadle v. City of Tampa*, 42 F.3d 633, 635 (11th Cir. 1995) (stating factors to be considered in determining whether release was voluntary and knowing); *Gormin v. Brown-Forman Corp.*, 963 F.2d 323, 327 (11th Cir. 1992) (same). Several objective factors are reviewed:

- Plaintiff's education and experience;
- Amount of time Plaintiff considered the agreement before signing it;
- The clarity of the agreement;
- Plaintiff's opportunity to consult with an attorney;
- Employer's encouragement or discouragement of consultation with an attorney;

and

- The consideration given in exchange for the waiver compared with the vested benefits the employee foregoes.

3) Forcing an employee to sign a release in a short time period could void the release.

- For example, in *Puentes v. United Parcel Service*, 86 F.3d 196 (11th Cir. 1996), the court held that Title VII plaintiffs who asserted that they were only given 24 hours to sign a release raised a genuine issue of fact as whether the release was signed knowingly and voluntarily and therefore defendant was not entitled to summary judgment.
- An exception to the 24-hour rule is where the agreement contains a revocation period allowing the employee to change his or her mind. *See Nero v. Hospital Authority of Wilkes County*, 86 F. Supp. 2d 1214 (S.D. Ga. 1998).
- Another exception to the 24-hour rule is where the employee or former employee was represented by an attorney who settled the matter on behalf of the employee. *Hayes v. National Service Industries*, 196 F.3d 1252 (11th Cir. 1999).

c. **FLSA Considerations**. Generally, a waiver and release in a severance agreement is not sufficient to waive claims for unpaid overtime and/or minimum wages pursuant to the Fair Labor Standards Act ("FLSA").

1) A release of FLSA claims will be effective if it reflects "a reasonable compromise over issues," 'such as FLSA coverage or computation of back wages that are' "actually in dispute" to be enforceable. *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1354 (11th Cir. 1982).

2) Further, for the release to be valid, one of three criteria must be met:

- The settlement negotiations must be supervised by the Secretary of Labor pursuant to 29 U.S.C. §216(c); or
- A court reviewed and approved the settlement in a private action for back wages under 29 U.S.C. §216(b); or
- Where a plaintiff is offered full compensation on the FLSA claim, there exists no compromise, thus, there is no need for judicial scrutiny or approval. *MacKenzie v. Kindred Hosp. East, L.L.C.*, 276 F. Supp. 2d 1211, 1217 (M.D. Fla. 2003).

3) Offering to resolve or tendering unpaid overtime does not moot FLSA claims.
   - *Manley v. RSC Corporation*, 2014 WL 3747695 (M.D. Fla. July 29, 2014) (absent an offer of judgment, offering full relief and/or tendering full relief to an employee does not moot the employee's claims).

d. **General Release/Confidentiality/Non-Disparagement Issues**.

1) General Release. *Moreno v. Regions Bank*, 729 F. Supp. 2d 1346 (M.D. Fla. 2010) (prohibiting a general release of all claims to resolve FLSA claims without additional consideration for the general release).

2) Confidentiality. *Pariente v. CLC Resorts and Developments, Inc.*, 2014 WL 6389756 (M.D. Fla. Nov. 14, 2014) (prohibiting confidentiality provision in FLSA release); *see also Dees v. Hydradry, Inc.*, 706 F. Supp. 2d 1227 (M.D. Fla. 2010).

3) Non-Disparagement. *Loven v. Occoquan Group Baldwin Park Corp.*, 2014 WL 4639448 (M.D. Fla. Sept. 16, 2014) (striking non-disparagement provision from settlement agreement because it constituted a judicially imposed restraint in violation of the First Amendment).

e. **FMLA Considerations**. Since the FMLA is patterned after the FLSA, there was an

argument that employees cannot waive past FMLA claims without approval by a court or through supervision by the DOL. However, in *Paylor v. Hartford Fire Insurance Company*, 748 F.3d 1117 (11th Cir. 2014), the court of appeals clarified that an employee can legitimately release FMLA claims that concern past employer behavior. Notwithstanding, an employee cannot waive "prospective" FMLA rights (i.e. violations of the statute that have yet to occur at the time of the signing of the release).

f. **ADEA/Older Worker Considerations**.

1) Waiver. Under the Older Workers Benefit Protection Act, 29 U.S.C.§626(f) ("OWBPA"), an employee or former employee cannot waive any right or claim under the ADEA unless the waiver is knowing and voluntary and satisfies the following requirements:

- the waiver is part of an agreement between the employee and the employer that is written in a manner that the average person can understand and participate in negotiating the language.
- the waiver specifically refers to rights and claims under the ADEA.
- the waiver does not apply to claims that arise after the date it was executed.
- the waiver is made in exchange for consideration in addition to anything of value to which the employee is already entitled.
- the employee is advised in writing to consult with an attorney prior to executing the agreement.
- the employee is given a period of 21 days in which to consider the agreement or 45 days if the waiver is requested as a separation incentive offered to a group or

class of employees.[2]

- the employee has at least seven days following execution to revoke.

2) Tender Back Monies. A claimant does not ratify an otherwise unenforceable ADEA release by retaining any settlement monies. In January 1998, the Supreme Court held that employees do not have to tender back monies to challenge the validity of a waiver under the ADEA. In short, retention of severance monies did not amount to a ratification of the release to the ADEA claims. *Oubre v. Entergy Operations, Inc*., 522 U.S. 422; 118 S. Ct. 838, 139 L. Ed. 2d 849 (1998); *Forbus v. Sears, Roebuck & Co*., 958 F.2d 1036 (11th Cir. 1992), *cert denied*, 113 S. Ct. 412 (1992).

g. **NLRA Considerations**. It is important to determine whether the severance agreement contains any provision that prevents or requires an employee to waive pursuing a class action, regardless of whether in court or arbitration.

- *See Murphy Oil USA and Sheila M. Hobson*, 361 NLRB No. 72 (October 28, 2014) (holding that requiring the waiver of class claims in any forum constitute an unfair labor practice and violate the NLRA). *Murphy Oil* is currently pending appeal to the Fifth Circuit Court of Appeals. *See* Agency No. 10-CA-038804, Case No. 14-60800.
- Notably, *Murphy Oil* followed a prior case issued by the NLRB, *D.R. Horton, Inc. & Michael Cuda*, 357 NLRB No. 184 (Jan. 3, 2012), which similarly held that the waiver of class claims interferes with employees' rights to engage in concerted

[2] Additional requirements apply if the waiver is in connection with a separation agreement or other employment termination offered to a group. For example if the waiver is applicable to the group, prior to the 21-day consideration period, the employer has to inform the individuals, in writing that is clear and understandable by the average person, of any class, or group covered by the program and eligibility factors among other things. 29 U.S.C. §626(f). In addition, the employer must provide the "job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program." 29 U.S.C. §626(f)(1)(H)(ii). A waiver of any charge filed with the EEOC may not be waived unless the first five requirements have been met and in any case no waiver agreement can affect the EEOC's rights to enforce the ADEA.

protected activities pursuant to Section 7 of the Act. However, the Fifth Circuit Court of Appeals rejected the NLRB's decision in *D.R. Horton*, 737 F.3d 344 (5th Cir. 2013). *Murphy Oil* re-affirmed its decision in *D.R. Horton*.

h. **Unemployment Considerations**. Florida Statute §443.041(1) makes it unlawful for an employer to require an employee to waive the employee's rights to receive unemployment benefits. An employer who violates this statute commits a misdemeanor in the second degree.

3. **Non-Release Terms of the Severance Agreement**.

a. **No Restrictions**. It is important to avoid provisions or language in an agreement that governmental agencies will find to prevent or restrict an employee or former employee from cooperating with the governmental agency. *See EEOC Guidance on Non-Waivable Employee Rights under the EEOC Enforced Statutes*, Number 915.002 (April 10, 1987).

1) For example, recently the EEOC has focused its attention on severance agreements that contain provisions it deems to violate Title VII or impedes the ability of the EEOC to investigate and prosecute discrimination claims.

b. **Recent Challenges by the EEOC to Severance Agreement Provisions**.

1) In February 2014, the EEOC pursued a case against CVS, Case No. 1:14-cv-00863 (N.D. Ill. Feb. 7, 2014), alleging that certain provisions in a severance agreement that CVS distributed to over 650 employees violated Title VII. The *CVS* case was ultimately dismissed on procedural grounds and did not get to the merits of the EEOC's case, but below is the specific language in those provisions, which the EEOC believed to be unlawful.

a) Cooperation. "In the event Employee receives a subpoena, deposition notice,

interview request, or another inquiry, process or order relating to any civil, criminal or **administrative investigation**, suit, proceeding or other legal matter relating to the Corporation from **any investigator**, attorney, or any other third party, **Employee agrees to promptly notify the Company's General Counsel by telephone and in writing**. (emphasis added)."

b) Non-Disparagement. "Employee will not make any statements that disparage the business or reputation of the Corporation, and/or any officer, director, or employee of the Corporation."

c) Non-Disclosure of Confidential Information. "Employee shall not disclose to any third party or use for himself or anyone else Confidential information without the prior written authorization of CVS Caremark's Chief Human Resources Officer." Such information includes "information concerning the Corporation's personnel, including the skills, abilities, and duties of the Corporation's employees, wages and benefit structures, succession plans, information concerning affirmative action plans or planning ..."

d) General Release of Claims. "Employee hereby releases and forever discharges CVS Caremark Corporation ... from any and all causes of action, lawsuits, proceedings, complaints, **charges**, debts contracts, judgments, damages, claims, and attorneys' fees against the Released Parties, whether known or unknown, which Employee has ever had, now has or which the Employee . . . may have prior to the date [of] this Agreement . ... **The Released Claims include…any claim of unlawful discrimination of any kind** … (emphasis added)."

e) No Pending Actions; Covenant Not to Sue. "Employee represents that as of the

date Employee signs this Agreement, Employee has not filed or initiated, or caused to be filed, or initiated, any complaint, claim, action or lawsuit of any kind against any of the Related parties in any federal, state, or local court, or agency. Employee agrees not to initiate or file, or cause to be initiated or file, any action, lawsuit, **complaint** or proceeding asserting any of the Released Claims against any of the Released Parties…. Employee agrees to promptly reimburse the Company for any legal fees that the Company incurs as a result of any breach of this paragraph by Employee." … "[n]othing in this paragraph is intended to or shall interfere with Employee's right to participate in a proceeding with any appropriate federal, state or local government agency enforcing discrimination laws, nor shall this Agreement prohibit Employee from cooperating with any such agency in its investigation. (emphasis added)."

f) In *CVS*, interestingly even though the Employer's covenant not to sue provision in the severance agreement contained disclaimer language (see above), the EEOC's position was that this specific disclaimer clause was not sufficient to negate the other provisions which it believed violated Title VII.

2) In *EEOC v. Baker & Taylor*, Civil Action No. 13-3729 (N.D. Ill. 2013), the EEOC alleged that the following provisions contained in a severance agreement were in violation of Title VII:

> **I further agree never to institute any complaint**, proceeding, grievance, or action of any kind at law, in equity, or otherwise in any court of the United States or in any state, or **in any administrative agency of the United States** or any state, country, or municipality, or before any other tribunal, public or private, against the Company arising from or relating to my employment with or my termination of employment from the Company, the Severance Pay Plan, and/or any other occurrences up to and including the date of this Waiver and

> Release, other than for nonpayment of the above-described Severance Pay Plan (emphasis added).
>
> I agree that I will not make any disparaging remarks or take any other action that could reasonably be anticipated to damage the reputation and goodwill of Company or negatively reflect on Company. **I will not discuss or comment upon the termination of my employment in any way that would reflect negatively on the Company. However, nothing in this Release will prevent me from truthfully responding to a subpoena or otherwise complying with a government investigation** (emphasis added).

The case was settled and the employer agreed to change the severance agreement by including a disclaimer that the agreement is not intended to limit an employee's right or ability to file discrimination charges with the EEOC or its state and local counterparts as well as affirmative statements regarding these employee rights.

3) In *EEOC v. CollegeAmerica Denver, Inc.*, Case No. 14-CV-1232, 2014 U.S. Dist. LEXIS 167333 (D. Colo. Dec. 2, 2014), the EEOC challenged the following provisions contained in a severance agreement as violations of the ADEA:

> (1.) … refrain from personally (or through the use of any third party) contacting any governmental or regulatory agency with the purpose of filing any complaint or grievance that shall bring harm to CollegeAmerica ….
> (3.) To not intentionally with malicious intent (publicly or privately) disparage the reputation of CollegeAmerica….

No decision was reached on these specific allegations as the court dismissed this specific challenge on procedural grounds.

4) Specifically, the EEOC alleged that these types of provisions in severance agreements deterred employees from filing charges of discrimination and prevented individual's ability from communicating with the EEOC, which interfered with the EEOC's statutory responsibility to investigate and enforce the anti-discrimination and anti-retaliation laws.

5) Thus, this is an important area to watch and make sure severance agreements do not contain such provisions that the EEOC or other governmental or regulatory agencies would take issue.

c. **Waiver of Right to File with the EEOC**. Courts have repeatedly held that "a waiver of the right to file a charge is void as against public policy." This is because the purpose of the charge is not to seek recovery but to inform the EEOC of possible discriminatory conduct. *EEOC v. Cosmair, Inc, L'Oreal Hair Care Div.*, 821 F.2d 1085 (1987). The filing of a charge allows the EEOC to investigate the alleged discrimination and to bring action against the non-government employers. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291-292, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002). ("[A]n employee's agreement to submit his claims to an arbitral forum [is not a] waiver of the substantive statutory prerogative of the EEOC to enforce those claims for whatever relief and in whatever forum the EEOC sees fit.")

d. **Non-Assistance Provisions**. Waivers preventing individuals from assisting others who file a charge of discrimination with the EEOC are void as against public policy. *Enforcement Guidance on Non-Waivable Employee Rights*, EEOC Notice 915.002; *see also EEOC v. Astra USA, Inc.*, 94 F.3d 738 (1st Cir. 1996).

e. **Liquidated Damages**. In Florida, liquidated damages or punitive damage clauses that are really penalty clauses in disguise are unenforceable in settlement agreements. The Florida courts have consistently found such contractual provisions unenforceable where the penalty is disproportionate to the damages. *See Hyman v. Cohen*, 73 So. 2d 393, 399 (Fla. 1954). Consequently, the Fifth Circuit has applied this analysis to those provisions in non-disclosure/non-compete agreements. It has concluded that parties may stipulate in

advance to an amount to be paid as liquidated damages only where the damage from the breach cannot easily be ascertained and is not grossly disproportionate to any damages that might reasonably be expected to flow from a breach. "The theory is simply that we do not allow one party to hold a penalty provision over the head of the other party 'in terrorem' to deter that party from breaching a promise." *Burzee v. Park Avenue Insurance Agency, Inc.*, 946 So. 2d 1200 (Fla. 5th DCA 2007) *citing, Crosby Forrest Products, Inc. v. Byers*, 623 So. 2d 565, 567 (Fla. 5th DCA 1993). Further, settlement agreements in Florida are interpreted and governed under contract law. *BP Products N. Am. v. Oakridge at Winegard, Inc.*, No. 6:06-cv-491-Orl-19DAB, 2007 U.S. Dist. LEXIS 93 (M.D. Fla. Jan. 3, 2007). Under that analysis, liquidated damage provisions in severance agreements should equally be unenforceable where an arbitrary sum is chosen by the employer.