

Settlement Agreements For Employment Termination Cases (With Sample Clauses And Forms)



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Terminations are hard for everybody. Don't make them worse by leaving important details up in the air.

NEGOTIATING AND DRAFTING settlement agreements in the context of employment disputes most often focuses on monetary compensation and other forms of consideration. From the employee's perspective, settlement discussions are a highly emotional process directly affecting his or her livelihood and future. For the employer, the process involves a multitude of competing business interests. From either angle, it is crucial that the parties memorialize all material terms of any settlement agreement in writing. This article addresses significant terms and provisions that most often appear in settlement agreements arising out of the employment context.

SETTLEMENT AGREEMENT TERMS • The scope of a settlement agreement is determined by the intent of the parties as expressed in the release. *Rinke v. Automotive Moulding Co.*, 573 N.W.2d 345-346 (Mich. App.1997). If the text of the release is unambiguous, the parties' intentions will be ascertained from the plain meaning of the release's language. *Id.* Therefore, the parties should try to stick to simple, plain English when drafting an agreement. As indicated by Mich. Ct. R. 2.507(G): "An agreement or consent by the parties or their attorneys respecting the proceedings in an action, subsequently denied by either party, is not binding un-

less it is made in open court, or unless evidence of the agreement is in writing subscribed by the party against whom the agreement is offered or by the party's attorney.”

Release Language, Scope, And Mutuality

Two of the most significant components in any settlement agreement are the release of all parties and the release of all claims. From the employer's perspective, it is imperative to name all affiliated or parent corporations, managers, employees, etc., even if not named specifically in the underlying claim(s). *See, Collucci v. Eklund*, 613 N.W.2d 654 (Mich. App. 2000) (upholding the release of other employees although employees were not parties to the release). Some things generally cannot be released, including unemployment compensation and workers compensation claims, as well as the right to file a discrimination charge with the Equal Employment Opportunity Commission or cooperating with the Equal Employment Opportunity Commission. 29 C.F.R. §1625.22(i)(2); *EEOC v. Citicorp Diners Club*, 985 F.2d 1036 (10th Cir. 1993), and *EEOC v. SunDance Rehabilitation Corp.*, 328 F. Supp. 2d 826 (N.D. Ohio 2004). Most often, plaintiff's counsel will attempt to obtain a mutual release. A mutual release emphasizes that the parties are actually and forever done dealing with each other. Further, and of particular importance to individual plaintiffs, mutuality in the release recognizes the dignity of both parties in the process.

Consideration

Consideration is an important part of the Agreement, and it can take several forms:

- **Severance Pay.** When an agreement is negotiated prior to an employee's termination and subsequent to litigation, it will generally provide for some sort of severance pay to the employee as consideration for the employee's promises to release the employer and leave his or her employment. Severance pay language ordinarily addresses the following points: the amount of the severance payment; the structure of the payments (one lump sum or smaller sums paid over time); the timing of the payment; and how the payment will be categorized (income, pain and suffering, etc.). The agreement should also contain a safe harbor provision for the employer in the event a payment is late: *If the Employer fails to make any of the payments provided for in this letter by the date indicated for such payment, interest on the unpaid amount will become due and owing at the rate of one and one-half (1.5) percent per month until paid;*
- **Accrued Vacation.** If applicable, the agreement should provide for a specific amount to be paid for accrued vacation and the time by which such amount should be paid. This is preferable to the agreement simply providing that an undetermined amount of accrued vacation will be paid. From the plaintiff's perspective, one way to handle vacation pay is for the agreement to provide: *Your last day of work will be Friday, June 3, 2011. Because of accrued vacation, you will remain on the payroll for all purposes for an additional four weeks until Friday, July 1, 2011;*
- **Bonus Plans.** The parties should consider the effect, if any, of bonus plans. Are there bonus amounts to which the employee has a vested right? What is the past practice or are there any written bonus plans in effect?
- **Business Expenses.** The document should provide what will be done to reimburse the departing employee for valid business expenses, including expenses already incurred and those for which the employee has not yet sought reimbursement;
- **Commissions.** The document should address the status of any commissions the employee claims are due and owing. The document should also clarify whether the employee has claims to any future commissions, and the terms under which such commissions will be

paid. Certainly, the employer will want to include a provision confirming it has paid the departing employee for all commissions if that is the case;

- **Consulting Agreement.** In some situations, the parties might enter into an agreement for the ex-employee to provide future services for the employer as an outside consultant. This type of arrangement can be identified in a Settlement Agreement through a provision similar to the following: *The Employer further agrees to retain Jane Smith as an outside consultant pursuant to the consulting agreement between the parties, a copy of which is attached hereto as Exhibit A;*
- **Disability Insurance.** The document might provide for some continuation of disability insurance. At a minimum, the document should specify what insurance continues, under what terms, and at whose expense;
- **Health Insurance.** The document should describe the parties' positions concerning health insurance, even if only to reiterate the plaintiff's COBRA rights. The document might provide for a continuation of health insurance at the expense of the employer: *The Employer will provide the Employee, beginning May 1, 2011, and at the Employer's expense, 18 months of COBRA continuation coverage under the Employer's medical/health insurance;*
- **Non-Retaliation.** In some circumstances, especially with an incumbent employee, the agreement might provide for non-retaliation. Sample non-retaliation language might read as follows: *The Employer agrees that it will not retaliate against the Employee because of any allegations involved in this Agreement;*
- **Outplacement Assistance.** The agreement may also provide for the employee to receive direct payment for the amount that would otherwise be paid by the company for outplacement assistance. The provision may read as follows: *The Employer will pay to Mr. Smith \$10,000.00 for job search counseling and expenses upon signature of this Settlement Agreement and Release;*
- **Pension and 401(k) Plans.** The agreement should provide that no vested pension or benefit rights are waived or released. This would prevent an accidental waiver of rights which the employee might reasonably have to some medical insurance benefits as well as 401(k) and pension plan benefits. The following passage is a sample of language addressing this topic: *This agreement does not release or waive: (1) your vested rights and benefits under any pension or welfare benefit plans, (2) any rights you may have under any liability insurance policy, including directors' and officers' liability, or under any policy or practice with respect to indemnification of directors, officers, or employees, and (3) your rights under this letter. This Agreement shall have no effect on the Employee's vested pension or retirement rights other than making appropriate contributions;*
- **Perquisites.** Employers may also want to address certain other "perks" of the job in the settlement agreement: *The Employer shall provide for you and your surviving spouse during your respective lives, and free of charge, complete Country Club memberships, including free dues and other fees for you, your surviving spouse, and your immediate family and maximum three guests, employee discounts and charging privileges, free golf privileges for you, your spouse and immediate family members. Until July 1, 2011, you will be entitled to an eighteen (18) percent discount on any Company real estate that is for sale and that you wish to purchase. The Employer agrees to name, by May 1, 2011, the campus ABC building the "John Smith Building," and to continue to bestow that name upon another appropriate building should the ABC building be destroyed.* Other perquisites might include company automobile, cell phones, condo and timeshare utilization, fax machine, and temporary office space or other related amenities;
- **Reinstatement.** Under certain circumstances, the agreement might provide for reinstatement of the employee: *The Employee will return*

to work on July 1, 2011, in the position of Executive Secretary to the new Financial Vice-President so long as she performs her job duties in a satisfactory manner for ninety (90) days, with the expectation that she would remain in that position as an employee-at-will thereafter. Other than the ninety (90) -day satisfactory performance provision, nothing in this paragraph is intended to reduce, diminish, or enhance the employment rights and prerogatives, which the Employee had, if any, before July 1, 2011;

- **Relocation Costs.** The document should also specifically describe what, if any, relocation costs are to be paid by the employer;
- **Return of Property.** The agreement should also account for and document the return of property from the employee to the employer: *Employee shall return all Company identification cards, keys, files, customer files, product, financial, marketing, and other business information belonging to the Company, and any other property belonging to the Company that she may have in her possession. This shall include but not be limited to the Company vehicle issued to her. By signing this Agreement, Employee acknowledges and confirms she has returned all property belonging to the company;*
- **Stock Options.** The settlement agreement should also describe the present status of all stock options, including the non-existence of certain options. The employer may also, through the settlement document, provide for the extinguishment of certain options, or set a timetable by which others must be exercised;
- **Unemployment Compensation.** If applicable, the agreement may clarify that the employer will not contest or do anything adverse to the employee's unemployment compensation claim. It is helpful if the agreement provides the specific language that the employee will utilize in her claim and the specific language that the employer will provide to the unemployment agency in response to information requests: *The Employer will provide accurate information regarding*

your earnings, but otherwise will not do anything, directly or indirectly, to dispute or contest any unemployment compensation claims that you might file.

COBRA

Settlement agreements should describe how COBRA payments will be handled for the employee. Responsibility for COBRA payments is a significant concern to most employees, and the topic is often addressed in settlement agreements: *Employee has certain rights to continuing health care benefits coverage under COBRA continuation coverage. The Company will pay the cost of COBRA continuation coverage for Employee's health, vision, and dental insurance until the end of July 2005, or until Employee accepts full-time employment, whichever occurs first. The Company shall have no further obligation concerning Employee's fringe benefits or other incidents of employment, except to provide Employee with the required COBRA notice of his right to obtain continuing health benefits coverage. It shall be Employee's responsibility to apply for COBRA continuation coverage and, following the Company's period of payment, to pay for the COBRA continuation.*

COBRA applies to most employers with 20 or more employees. Qualified beneficiaries usually include spouses and dependent children. 29 U.S.C. §1167(3). Qualifying events triggering COBRA's notice provisions include termination of employment for any reason other than gross misconduct. 29 U.S.C. §1163. The maximum coverage period is 18 months for termination or reduction of hours. The maximum coverage period is 36 months for death, divorce, or separation. 29 U.S.C. §1162(2)(A). COBRA permits the court to assess statutory penalties against plan administrators for failure to comply with the notice requirements. 29 U.S.C. §1132(c)(1).

Admissions

Settlement agreements often contain clauses in which the employer disclaims any liability for, or

admission of the underlying allegations. However, certain claims cannot be waived, such as claims under the Fair Labor Standards Act (FLSA). As a result, the parties may want to consider having the employee acknowledge certain factual circumstances: *Employee acknowledges and confirms that, as of termination date, she has received all compensation from the Employer to which she is entitled, and no additional compensation is due and owing*. A standard non-admission clause might read as follows: *The parties understand that this agreement is to be regarded as a “no-fault” settlement, and, as such, this agreement is not intended and will not be construed to constitute an admission or statement by either party as to the validity or invalidity of any legal or factual contention advanced in this matter. This agreement is not to be cited as evidence of discrimination or as background information in any other case or dispute involving the employer or its employees. It is further agreed and acknowledged that the consideration for this Agreement is provided solely to purchase peace and that the Company does not hereby admit any liability on account of any said claims or matters, but expressly denies all of such liability whatsoever.* If there are counterclaims pending against the employee, or the employee is concerned about allegations of wrongdoing, he or she will likely demand a mutual release of claims.

Confidentiality And Its Limits

Most employers demand confidentiality provisions in settlement agreements and releases. These provisions may be drawn so narrowly that they prohibit only the settling employee from discussing the settlement amount, or so broadly that the settling employee is prohibited from revealing any information gleaned during the course of his or her employment. At a minimum, confidentiality provisions should include three components. The first component involves confidentiality of the agreement. The second component should provide for a specific statement that the parties will give if questioned about the claims, (e.g., “the parties have amicably resolved their dispute”). Finally, from the

employer’s perspective, there should be some penalty assigned for violations of the confidentiality provisions. The employer should also push to have the employee’s spouse and attorney agree to the confidentiality provisions. From a practical standpoint, it is also important that the confidentiality clause make exceptions for certain disclosures: *Employee covenants that, at no time before the date of the signing of this Agreement, she has reviewed, discussed, or disclosed, orally or in writing, the existence of the Agreement, the negotiations and discussions leading to the Agreement, or any of its terms or conditions with any person, organization or entity other than her spouse, attorney, or tax consultant. Employee further agrees that from the date of signing this Agreement onward, she will keep the existence of this Agreement, the negotiations and discussions leading to this Agreement, and the terms and conditions of this Agreement strictly confidential and, except as may be required by law, will not review, discuss or disclose, orally or in writing, the existence of this Agreement, the negotiations leading to this Agreement, or any of its terms or conditions with any persons, organization, or entity, other than her spouse, attorney, or tax consultant, on the condition that disclosure by such persons shall be deemed a breach of this Agreement. If inquiries arise regarding Employee’s dispute with Employer or this Agreement by anyone other than those listed, Employee will simply state “the matter has been resolved” and will make no further comment. If Employee is required by law through subpoena or otherwise to disclose information described in this paragraph, she will immediately contact Employer’s Attorney to inform her of that fact and to provide Employer an opportunity to challenge the legal process which Employee believes would result in the disclosure of such information. You agree that you will not disclose to others, except your immediate family, attorneys, and tax advisers or officials, the terms of this letter, other than as required by law. The Employer agrees that it, its officers, directors, agents, attorneys, and the following named individuals: Jane Doe and John Smith will not disclose the existence or terms of this agreement to any person inside or outside of the Company, other than to those having a material and legitimate business necessity for the information.*

Alternative language might read: *The parties agree to keep the terms of this settlement agreement confidential. For the purposes of this agreement, “confidential” means the facts and issues of the underlying complaint and the terms of this agreement shall not be disseminated, discussed, or commented upon to anyone other than Employer officials having a need to know in order to implement this agreement. However, the Employee may disclose the terms of this agreement to her immediate family members, tax preparers, taxing officials, attorneys, and as otherwise required by law.*

Dismissal And Withdrawal Of Claims

The agreement should specify that the underlying lawsuit or charge will be dismissed with prejudice by a date certain: *Employee agrees to direct her attorney to take all steps necessary to enter an Order of Dismissal with prejudice and without any award of costs or attorneys’ fees to either side with respect to Employee’s claims currently pending against Employer in the Federal District Court for the Eastern District of Michigan. The stipulation to said Order must be in the possession of Employer’s counsel before any amounts being paid by Employer.* Of course, if there is a stipulation of dismissal pursuant to Fed. R. Civ. P. 41, there might not be an order of dismissal.

Non-Disparagement

After an employment separation, both parties are often concerned that the other side will make disparaging comments. Aside from the legal protections afforded by defamation claims under State law, the settlement agreement often addresses disparagement issues: *As a material inducement for Employer to enter into this Agreement, Employee agrees that she will not: (i) make any negative or disparaging comments about Employer, its directors, board members, officers, employees, volunteers, affiliates, attorneys consultants, and agents, and their respective heirs, executors, administrators, successors and assigns; and will not (ii) directly or indirectly, disclose disseminate, or use any confidential information concerning the Employer.* A mutual non-disparagement provision might read as follows: *Employer and Employee agree that from this time forward they will refrain from making any defamatory or de-*

rogatory remarks about the other, or any person associated with or representing the other. Employer and Employee further agree that from this time forward they will not make or repeat any allegation of illegal, immoral, unethical, or improper conduct about the other, unless ordered to do so by a court of competent jurisdiction or otherwise required by law.

Neutral References And The Employee’s Personnel File

It is not uncommon for a departing employee to request assurances that the employer will provide a neutral reference to future potential employers. Such a reference typically includes a simple verification of the position the employee held and the employee’s dates of employment. Failure of an employer to comply with this term may result in the former employee bringing claims for breach of the settlement agreement, defamation, and/or tortious interference with a business relationship: *Employer, upon written request from Employee, will provide her with a written neutral reference indicating her dates of employment, job title, and salary history with Employer.*

From the employee’s perspective, an attempt should be made to obtain more favorable language than the above. A more desirable provision might read: *The Employer will refer all inquiries or requests for information regarding you or your employment to the Director of Human Resources, who will not make any disparaging remarks concerning you. The Director of Human Resources will be the only employee or agent of the Company authorized to make any statements concerning your employment with the Company. Any such statements by other employees or agents would be outside the course and scope of their employment. If asked, the Director of Human Resources will respond, in writing, and will only provide the following information unless otherwise required by law: “Employee was a loyal and dedicated employee of Company from (Start Date) until (Separation Date). His title was (Job Title) until he voluntarily resigned in July of 2011 to pursue other endeavors. While Employee was the (Job Title), the organization (succeeded/ flourished/etc.). Employee exceeded his job require-*

ments and was a trusted advisor to many key individuals for the Company during his employment.”

In addition, the agreement with the Employee might provide that, if presented with an authorized request, the Director of Human Resources will provide salary information as well: *At the time Employee resigned, his annual income was roughly (Annual Salary), plus benefits.* The agreement might also provide for the following to occur with the personnel file: *The Employer will cleanse, purge, and destroy from all its records all documentation concerning or reflecting the Employee’s unemployment compensation proceedings, EEOC/MDCR proceedings, and adverse information, including, but not limited to, probation, monitoring, discipline, and/or involuntary termination. This does not preclude such documentation being kept in a completely separate file at the offices away from the Employer property or the Employer’s outside counsel.*

Rehire Provisions

A key provision in any employment related settlement agreement is the former employee’s waiver of any right to future employment with any of the parties released. The provision should specify that the individual will not seek to be rehired and that the employer’s decision not to rehire the employee will not suffice to form the basis of any lawsuit by the employee against the employer: *Employee confirms and agrees that she will not apply for, seek, or accept employment with Employer. If she does apply, Employer may deny her such employment because of this Agreement, and such denial shall not constitute any violation of any laws, rules, or orders of any state, municipality, or of the United States. The parties agree and acknowledge that by this Agreement, they seek an unequivocal, complete, and final dissolution of the employment relationship between Employee and Employer.*

Alternative language might read: *You agree that you will not knowingly seek re-employment with employer or any of its related entities as they are currently constituted, unless employer desires otherwise, and communicates its desire to you in writing.*

Violation Of Terms

Generally, an individual who knowingly executes a settlement agreement and receives the recited consideration will not be able to avoid the terms of the release unless he or she can demonstrate by a preponderance of the evidence that the release is “unfair or incorrect on its face.” *Stefanac v. Cranbrook Educational Community (After Remand)*, 458 N.W.2d 56 (Mich. 1990). To protect against an employee backing out of a settlement agreement, the agreement might include a provision similar to the following: *Employee agrees that in the event she files any claim, lawsuit, proceeding or in any other manner seeks to invalidate any provision of this Agreement, she will be required to immediately return any and all amounts previously paid to her pursuant to the terms of this Agreement.* The document might also contain a “safe-harbor” provision to allow the parties to rectify any alleged breaches of the agreement: *In the event that any dispute arises with respect to the Agreement, the party who believes there may be a breach shall contact the other party in writing setting forth the reason(s) for said belief and shall give the party ten (10) business days to remedy the matter.*

Non-Assignability Of Claims

Settlement agreements typically contain an acknowledgment by the employee that she has not assigned any of the claims she has or may have against the employer to any other party. To protect the employer in the event the employee had previously assigned a claim, the agreement might provide that: *This Agreement shall be binding upon the parties and their respective personal representatives, heirs, executors, successors and assigns.* The agreement might also provide that: *In the event of the Employee’s death, the benefits and payments provided for herein shall inure to the benefit of the Employee’s estate.*

Advice Of Counsel

All settlement agreements should include an acknowledgment from the plaintiff that she has had an opportunity to consult with an attorney about

the agreement and that she is executing the agreement of her own free will: *By signing this Agreement, Employee acknowledges that she has read this Agreement in its entirety, she understands it, she has been given an opportunity to consult with or obtain representation from an attorney in connection with this Agreement, and her consent to all of the Agreement's provisions is given freely, voluntarily, and with full knowledge and understanding of the Agreement's contents.*

Liquidated Damages And Enforcement Procedures

Agreements may also contain provisions describing how disputes over the Agreement will be resolved: *The parties agree that in the event any disputes relating to or arising out of this Agreement or Employee's employment with Employer will be resolved through arbitration conducted by the American Arbitration Association. The parties further agree that the award in such arbitration will be binding and enforceable pursuant to the Michigan Arbitration Act, and the Federal Arbitration Act, 9 U.S.C. §1 et seq. This section will not restrict Employer's right of equitable relief in a court of law for any breach or violation of any duty owed or obligation of non-disparagement, confidentiality or duty of loyalty owed by Employee to Employer.*

As a practical matter, the employee should be afforded the same rights as the employer to bypass the ADR provisions and enforce the non-disparagement provisions in the Agreement. The parties may wish to include provisions in the dispute resolution section of the agreement providing for collaborative discussions prior to formal arbitration. The parties may also establish the location of the arbitration in the Agreement.

Attorneys' Fee Issues

The Agreement may also define how the settlement will be apportioned between the plaintiff and her attorney: *The employer will pay a total of \$300,000 to resolve the discrimination claims at issue. There will be separate checks. The first check will be for a gross amount*

of \$200,000, representing lost wages, and will be made payable only to the employee. Tax and FICA deductions will be made from this check and a W-2 will be issued to the employee. There will be a second check issued for \$100,000 payable only to Plaintiff's attorney. This check will represent attorney fees owing to the attorney under applicable civil rights attorney fee statutes. A 1099 to the attorney only will be issued for this check.

Non-Compete And Trade Secret Considerations

The agreement should clarify the status of prior non-compete and trade secret agreements. Does the settlement agreement incorporate or renew prior non-compete/trade secret agreements or does it, by accident or otherwise, extinguish prior non-compete/trade secret agreements? In addition, from the perspective of both parties, if the agreement provides only small monetary consideration, but for the first time raises non-compete obligations, does it simply create a situation where the employee might not agree to the settlement agreement?

Spouse And Derivative Causes Of Action

To the extent that an employee's spouse has joined the litigation (*e.g.*, through a loss of consortium claim), the spouse should also be a signatory on the agreement.

Structured Settlements

A structured settlement is an arrangement for periodic payments to plaintiffs, which are usually funded by an annuity or series of annuities purchased through a life insurance company. Using structured settlements may be an efficient method of resolution for both parties. The settlement agreement should reference the structured settlement arrangement and provide contact information for the insurance company administering the annuities and payments.

Coordination With Workers' Compensation

Settlement of claims under workers' compensation statutes occasionally plays a role in the context of settling an employment dispute. Michigan's Mich. Comp. Laws §418.101-.941 provides a good example. Under that statute, workers' compensation claims can be settled one of two ways: The employee and employer agree on a set amount of money for a period of time, but the employee retains the right to seek additional benefits at a later time; or the employee and employer enter into a full and final settlement ("redemption").

The following is release language illustrating the coordination of a worker's compensation redemption in the context of employment litigation: *Employee agrees to cooperate fully with counsel for the Employer to facilitate the prompt redemption of all of Employee's rights under the Michigan Workers' Disability Compensation Act. Upon (a) execution of this Agreement by Employee and delivery of the Agreement to counsel for the Employer; (b) the execution by Employee or her attorney of appropriate paperwork for the dismissal of the Lawsuit (held, in trust, until the settlement checks have been received by Employee's attorneys); (c) the expiration of any applicable revocation period; (d) the entry of a Redemption Order by the Michigan Bureau of Unemployment and Workers' Compensation; and (e) the expiration of the appeal period associated with the redemption of all of Employee's workers' compensation rights, the Employer will pay the total amount of Five Thousand and 00/100 (\$5,000.00) Dollars ("Settlement Amount") to Employee.*

Offer Of Judgment

For offers of Judgment, see Fed. R. Civ. P. 68, Mich. Ct. R. 2.405, and other similar State rules.

Older Workers Benefit Protection Act (OWBPA)

The Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 et seq. (ADEA) was amended in 1990 with the OWBPA, 29 U.S.C. §626(f). The

OWBPA regulates employee waivers and releases under the ADEA and requires that any waiver of ADEA claims must be "knowing and voluntary." The OWBPA specifies eight requirements that must be either satisfied or deemed inapplicable for any waiver to be considered "knowing and voluntary." Among these requirements are the following:

- The release agreement must specifically refer to rights under the ADEA;
- That the employee waives rights to consideration in addition to something to which the employee is already entitled;
- That the employee was advised in writing to consult with an attorney prior to executing the agreement;
- That the employee was given 21 days — and up to 45 days in some circumstances — to consider the agreement; and
- That the agreement provide for at least seven days in which the employee may revoke the agreement.

Id. §626(f)(1)(B), (D)-(G).

Below are examples of provisions geared toward complying with the OWBPA: *In consideration of this Agreement, and as a material inducement to Employer to enter into this Agreement, Employee, for herself and her heirs, executors, administrators, successors and assigns hereby release Employer, its directors, board members, officers, employees, volunteers, affiliates, attorneys, consultants, and agents, and their respective heirs, executors, administrators, successors and assigns; both individually and collectively, from any and all claims, demands, liabilities, agreements, damages, or causes of action (including claims for costs and attorney fees) which Employee ever had, now has, or hereafter may have against Employer, arising, according, or originating at any time whatsoever up to and including the date of this Agreement, whether presently known or unknown, whether liquidated or unliquidated, concerning any and all matters whatsoever, and including, but not limited to, any and all claims, based on age, sex, race, religion, national origin,*

disability, public policy, the Age Discrimination in Employment Act, or other discrimination, harassment, or wrongful discharge or breach of contract or implied contract, but excluding Employer's obligations under this Agreement. The Employee does not waive rights or claims that may arise after the date this Waiver is executed.

- *Employee acknowledges that this release is being given in exchange for consideration and benefits in addition to that to which she is already entitled.*
- *Employee is advised to consult with an attorney prior to executing this agreement.*
- *Employee acknowledges that she has read this Agreement in its entirety, that she understands she has the opportunity to consult with or has been represented by her own attorney in connection with this Agreement, and that her agreement to all of its provisions is made freely, voluntarily, and with full knowledge and understanding of its contents.*
- *Employee understands she has been given a period of twenty-one (21) days to review and consider this Agreement before signing it. Employee further understands she may use as much of this twenty-one (21) day period as she wishes prior to signing and returning the signed Agreement to Employer.*
- *Employee may revoke this Agreement within seven (7) days of Employee signing it. Revocation must be made by delivering a written notice of revocation to: [name and address]. For any such revocation to be effective, written notice must be received no later than the close of business on the seventh day after Employee signs this Agreement. If Employee revokes this Agreement it will not be effective or enforceable and Employee will not receive any of the compensation or other benefits described in the Second Paragraph of this Agreement. The Agreement will not become effective or enforceable until the revocation period has expired.*

A release that does not comply with the OWBPA does not bar an ADEA claim and the employee does not have to tender back the moneys received pursuant to the release in order to bring an ADEA action. *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422

(1998). In *Oubre*, an employee, as part of a termination agreement, signed a release of all claims against her employer. In consideration, she received severance pay in installments. The release did not comply with the OWBPA, 29 U.S.C. §626(f). After receiving the last payment, the employee brought suit under the ADEA. The employer claimed that the employee ratified and validated the non-conforming release by retaining the moneys paid to secure it. The employer also insisted that the release barred the action unless, as a pre-condition to filing suit, the employee tendered back the moneys received. The Supreme Court disagreed and ruled that, as the release did not comply with the OWBPA, the release cannot bar the ADEA claim.

In *Stefanac*, *supra*, the Michigan Supreme Court held that settlement agreements are binding until rescinded for cause. Tender of consideration received is a condition precedent to the right to repudiate a settlement contract. The general rule is that a plaintiff has a duty to tender the consideration recited in a release. This tender must occur within a reasonable time after the plaintiff learns of the grounds for repudiating the release and settlement tender must occur before or simultaneously with the filing of a suit alleging a cause of action arising out of the release agreement.

Tax Consequences And Reporting

Attorneys crafting settlement language must always bear in mind the implications of the tax code and relevant case law on settlements. The following four provisions and decisions are especially important.

First, Internal Revenue Code (IRC) section 104(a)(2) relates to “personal injuries or sickness,” and does not authorize a taxpayer to exclude from his or her gross income the amount received in settlement of a claim for backpay and liquidated damages under the ADEA.

Second, the amount of a recovery in a case pursuant to the Americans with Disabilities

Act (ADEA) is not excludable from gross income. See *Commissioner v. Schleier*, 515 U.S. 323 (1995).

Third, pursuant to section 1605 of the Small Business Job Protection Act of 1996, Pub. L. 104-188, 110 Stat. 1755, most punitive damages do not fall within the exclusion provided by IRC section 104(a)(2) and hence are taxable. See *O’Gilvie v. United States*, 519 U.S. 79 (1996).

Fourth, the American Jobs Creations Act of 2004 (AJCA), Pub. L. No. 108-357, 118 Stat. 1418, 1546 (section 703, “Civil rights tax relief”) amended the tax code in October of 2004 and allows plaintiffs, in computing adjusted gross income, to deduct “attorney fees and court costs paid by, or on behalf of the taxpayer in connection with any action involving a claim of unlawful discrimination.” *Commissioner v. Banks*, 543 U.S. 426, 433 (2005). The Act defines “unlawful discrimination” to include claims under several federal civil rights statutes, any federal whistleblower statute, any federal, state, or local law “providing for the enforcement of civil rights or regulating any aspect of the employment relationship...or prohibiting the discharge of an employee, or any form of retaliation or reprisal against an employee for asserting rights or taking other actions permitted by law.” *Id.*, citing 26 U.S.C. §62(e). Under this section of the AJCA, individuals who received court awards and settlements after October 22, 2004, can deduct the fees and costs paid to their attorneys. *Id.* In *Banks*, the Court faced the issue of whether the portion of a money judgment or settlement paid to a plaintiff’s attorney under a contingency fee agreement was income to the plaintiff under the IRC. The *Banks* case was comprised of two companion cases. In *Banks v. Commissioner*, 345 F.3d 373 (6th Cir. 2003), the Court held that the contingency portion of a litigation recovery should not be included in the plaintiff’s gross income. In *Banaitis v. Commissioner*, 340 F.3d 1074 (9th Cir. 2003), the Court held that the portion of the recovery paid to the attorney as a contingency fee is excluded from the plaintiff’s

gross income if State law gives the plaintiff’s attorney a special property interest in the fee, but not otherwise. The Supreme Court held in *Banks* that, as a general rule, when a litigant’s recovery constitutes income, the litigant’s income includes the portion of the recovery paid to the attorney as a contingency fee. The Supreme Court thereby reversed the decisions of the Sixth and Ninth Circuits. In *Banks*, the fee paid to the attorney was calculated solely on the basis of the private contingency contract. There was no court-ordered fee award. Nor was there any indication in *Banks*’ contract with his attorney or in the settlement agreement with the defendant that the contingency paid to *Banks*’ attorney was in lieu of statutory fees *Banks* might otherwise have been entitled to recover. After the *Banks* and *Banaitis* cases arose, but before the Supreme Court’s opinion in *Banks*, Congress enacted AJCA, and the Act is not retroactive.

Venue, Choice Of Law, And Consent To Personal Jurisdiction

The settlement agreement might contain a provision providing for the venue of any enforcement actions, and, in addition, the law to be applied. A choice of law provision might provide that: *This Agreement shall be construed in accordance with the laws of the State of Michigan, regardless of any state’s choice of law analysis. The parties hereby expressly agree that any action brought to enforce or concerning this Agreement shall be brought only in the Thirteenth Circuit Court for the State of Michigan. Further, Michigan law permits parties to consent to personal jurisdiction by agreement. See, e.g. Mich. Comp. Laws §600.701(3); §600.711(2); §600.745.*

Withdrawal Of All Claims

If there are agency administrative charges still pending, the agreement should provide for the withdrawal with prejudice of all administrative charges by a date certain, and make payment of any money contingent on confirmation of withdrawal.

Fraud In The Execution

Even after an employer has taken all the steps outlined above, and more where appropriate, and the former employee has signed the settlement agreement and release, the employee may still challenge the validity of the release on the basis of fraud. However, and in most circumstances, such a challenge may only be advanced after the employee has tendered the consideration he or she received in exchange for the release. *Stefanac*, supra, 435 Mic. at 159, 165, 458 N.W.2d at 58, 60; *Rinke*, supra.

The plaintiff may be excused from returning the consideration (the “tender back” rule) only if the defendant waives the duty to tender back or the plaintiff demonstrates fraud in the execution. *Stefanac*, supra, 458 N.W. 2d at 60. To establish fraud in the execution, a plaintiff must show that she executed the agreement with neither knowledge nor

reasonable opportunity to obtain knowledge of its character or its essential terms. *Id.*

“Yellow Dog” Contract

A yellow dog contract is a contract that forbids an employee from joining a labor union. It would appear that it would be illegal to have a yellow dog provision in a separation agreement. Norris-LaGuardia Act, 29 U.S.C. §103; cf. *Adair v. United States*, 208 U.S. 161 (1908).

Zipper Clause

The agreement should provide that it supersedes all oral understandings and that all amendments must be in writing and signed by both parties: *This Agreement contains the entire understanding between the parties with regard to the matters set forth herein. There are no understandings or agreements between the parties in relation thereto, oral or otherwise, except as herein expressly set forth.*

APPENDIX 1

Sample Release and Settlement Agreement

THIS AGREEMENT Is Made As Of December 1, 2011 Between EMPLOYEE (“EMPLOYEE”) AND THE CORPORATION (“THE COMPANY”).

RECITALS

- a. EMPLOYEE was an employee of the COMPANY; and
- b. EMPLOYEE has initiated litigation against the COMPANY which is pending in the United States District court for the Eastern District of Michigan; and
- c. The COMPANY denies the allegations made against it in the litigation initiated by EMPLOYEE; and
- d. The parties to this Agreement, to avoid the costs and delays associated with litigation, have engaged in negotiations in an attempt to resolve this matter. EMPLOYEE and the COMPANY agree as follows:

AGREEMENT

1. Payments. The COMPANY, in order to resolve the dispute which has arisen between it and EMPLOYEE without further litigation and the associated costs, agrees to pay a total of \$13,500 in the following manner:

- a. \$12,000, less all applicable local, state, and federal withholding, will be paid to EMPLOYEE. The COMPANY will issue to EMPLOYEE a W-2 form including said amount. \$1,500 will be paid directly

to EMPLOYEE'S ATTORNEY in a separate check, and the COMPANY will issue a 1099 Form only to such ATTORNEY for this \$1,500 amount;

b. EMPLOYEE agrees to indemnify and forever hold the COMPANY harmless against loss from any and all further claims, demands, and actions in law or in equity, by and federal, state, or local taxing authority with respect to the allocations and payments set forth in this Agreement, including, but not limited to, claims, demands, or actions involving the payment or withholding of federal taxes, state taxes, local taxes, or Social Security payments, including interest or penalties.

2. General Release. In consideration for the promises made by the COMPANY in this Agreement, EMPLOYEE for herself and her family, heirs, executors, administrators, personal representatives, agents, employees, assigns, legal representatives and accountants, affiliates, and for any partnerships, corporations, sole proprietorships, or other entities owned or controlled by her, fully releases, acquits, and forever discharges the COMPANY, its past, present, and future officers, directors, shareholders, agents, representatives, insurers, employees, attorneys, subsidiaries, affiliated corporations and assigns, from any and all charges, actions, causes of action, claims, grievances, damages, obligations, suits, agreements, costs, expenses, attorneys' fees, or any other liability of any kind whatsoever, suspected or unsuspected, known or unknown, have or could have arisen out of EMPLOYEE's employment with the COMPANY and/or any other occurrence or claim whatsoever arising on or before the date this Agreement is executed, including, but not limited to:

a. Claims arising under Title VII of the Civil Rights Act of 1964 (as amended); the Civil Rights Act of 1991; Section 1981 of the Civil Rights Act of 1866; the Americans With Disabilities Act; the Michigan Elliott-Larsen Civil Rights Act; Michigan's Persons With Disabilities Civil Rights Act; the Employee Retirement Income Security Act; the Age Discrimination in Employment Act; and/or any other state, federal, local, or municipal statute; and/or

b. Claims arising out of any federal, state, or local statute, law, constitution, ordinance or regulation; and/or

c. Any other claim whatsoever including, but not limited to, claims relating to implied or express employment contracts; public policy or tort claims; retaliatory discharge claims; negligent hiring, retention, or supervision claims; defamation claims; wrongful discharge claims; intentional infliction of emotional distress claims; invasion of privacy claims; intentional interference with contract claims; intentional interference with business relations claims; negligence claims, detrimental reliance claims; loss of consortium claims, promissory estoppel claims; personal injury claims; common law claims; claims for compensatory or punitive damages; claims for back pay claims relating to legal restrictions on the COMPANY's right to terminate employees or pursuant to any other claim whatsoever; arising out of or relating to EMPLOYEE's employment with the COMPANY and/or any other occurrence to the date of this Agreement, but excluding claims which EMPLOYEE cannot waive by law, and claims for breach of this Agreement.

3. No Liability. The COMPANY does not admit any liability toward EMPLOYEE for any alleged acts or omissions. The parties are entering into this Agreement merely to avoid the costs and inconvenience associated with protracted litigation of this matter.

4. Waiver of Future Employment. EMPLOYEE waives all rights to employment with the COMPANY, its subsidiaries, and affiliated companies. If EMPLOYEE does apply for employment with the COMPANY, its subsidiaries, or any of its affiliated companies, the COMPANY and EMPLOYEE agree that the COMPANY, its subsidiaries, and its affiliated companies need not employ her, and that if the COMPANY, its subsidiaries, and its affiliated companies decline to employ her, they shall not be liable to EMPLOYEE for any cause or damages whatsoever.

5. Confidentiality. EMPLOYEE covenants that, at no time prior to the date of the signing of this Agreement, she has reviewed, discussed, or disclosed, orally or in writing, the existence of the Agreement, the negotiations and discussions leading to the Agreement, or any of its terms or conditions with any person, organization, or entity other than her spouse, attorney, or tax consultant. EMPLOYEE further agrees that from the date of signing this Agreement onward, they will keep the existence of this Agreement, the negotiations and discussions leading to this Agreement, and the terms and conditions of this Agreement, strictly confidential and, except as may be required by law, will not review, discuss, or disclose, orally or in writing, the existence of this Agreement, the negotiations leading to this Agreement, or any of its terms or conditions with any persons, organization, or entity, other than her spouse, attorney, or tax consultant, on the condition that disclosure by such persons shall be deemed a breach of this Agreement. If inquiries arise concerning EMPLOYEE's dispute with the COMPANY or this Agreement by anyone other than those listed, EMPLOYEE will simply state "the matter has been resolved" and will make no further comment. If EMPLOYEE is required by law through subpoena or otherwise to disclose information described in this paragraph, she will immediately contact the COMPANY's attorney to inform her of that fact and to provide the COMPANY an opportunity to challenge the legal process which EMPLOYEE believes would result in the disclosure of such information.

6. Stipulation of Dismissal. EMPLOYEE agrees to direct her attorney to take all steps necessary to enter an Order of Dismissal with prejudice and without any award of costs or attorneys' fees to either side with respect to EMPLOYEE's claims currently pending against the COMPANY in the Federal District Court for the Eastern District of Michigan. The stipulation to said Order must be in the possession of the COMPANY counsel prior to any amounts being paid by the COMPANY.

7. Return of Documents. EMPLOYEE and her attorney will return to the COMPANY's counsel all documents produced by Defendants during the course of discovery that pertain to or mention the COMPANY's employees or applicants other than EMPLOYEE, and all copies thereof, within 15 days of execution of this agreement

8. Breach of Agreement. It is further agreed that this Agreement shall be deemed breached and a cause of action accrued thereon immediately upon the commencement of any act, action, or conduct contrary to the Agreement, and in any such action this Agreement may be pleaded by any of the parties, both as a defense and a counter-claim or cross-claim in such action.

9. Liquidated Damages. The parties agree that their liability in any action or other proceeding accruing from a breach of this Agreement shall include not only the monetary amount of any judgment which

may be awarded against the breaching party, in any action or proceeding commenced in breach of this Agreement, but also all other damages, costs, and expenses sustained by the parties, on account of such action, including attorneys' fees and all other costs and expenses, in preparing the defense of and defending such action or proceeding, in establishing or maintaining the application or validity of this Agreement or provision thereof, and in prosecuting any counter-claim or cross-claim therein.

10. Consideration Period. EMPLOYEE certifies that she has been given twenty one (21) days in which to consider whether to sign this Agreement. If EMPLOYEE signs this agreement before the expiration of that 21-day period, she does so of her own volition, and without any demand or inducement by the COMPANY to do so.

11. Revocation of Certain Claims. EMPLOYEE understands that for seven (7) days following execution of this Agreement, she may revoke her waiver of her claims under the Age Discrimination in Employment Act of 1967 (ADEA). Such a revocation, to be effective, must be in writing and delivered to Defendant's attorney. Should EMPLOYEE revoke the waiver of her ADEA claims pursuant to this section, this entire agreement will be rendered null and void.

12. Nondisparagement. EMPLOYEE agrees not to make any untrue statement(s), either oral or written, about the COMPANY or its management regarding any events taking place during her employment, EMPLOYEE will not disparage in any way the reputation of the COMPANY, its managers, executives, or employees to any third person.

13. Severability. Should one or more of the provisions of this Agreement be found to be invalid, illegal, or unenforceable for any reason, the validity, legality, and enforceability of the remaining provisions contained herein shall not be impaired or affected in any way.

14. Consultation with Attorneys. EMPLOYEE understands and agrees that she has been advised to consult with her attorneys before executing this Agreement.

15. Full Integration. The parties declare and understand that no promises, inducements, or agreements not contained in this Agreement have been made to them, that this Agreement contains the entire agreement among the parties, and that the terms of this Agreement are contractual and not merely a recital. In agreeing to sign this Agreement, EMPLOYEE acknowledges that she has not relied on any statement or explanations made by the COMPANY or its attorneys.

16. Choice of Law. This Agreement is to be interpreted and applied according to the laws of the State of Michigan.

/s/ EMPLOYEE Date /s/ For the Company
Date

APPENDIX 2
Sample Settlement Agreement and Mutual Release

**Employee and Employer agree as follows to this Settlement Agreement
and Mutual Release:**

1. Employee has filed EEOC/MDCR charge numbers _____, and received Notices of Right to Sue in those charge numbers, and she has alleged, in part, that the Employer's termination of her violated 42 U.S.C. §2000e, 42 U.S.C. §1981, and Mich. Comp. Laws §37.2201 et seq.
2. As part of the above charges and allegations, Employee has sought to recover damages, including personal injury damages and pain and suffering damages, under 42 U.S.C. §2000e, 42 U.S.C. §1981, and Mich. Comp. Laws §37.2201 et seq.
3. The Employer has denied and continues to deny all allegations of illegality or other misconduct.
4. It is further understood and agreed that this Settlement is the compromise of a doubtful and disputed claim and that payments made are not to be construed as an admission of liability.
5. In consideration of the Employer completely paying and the payments being consummated as provided for in this Agreement, Employee releases Employer of all liability, including liability for alleged employment law violations, including all causes of action under 42 U.S.C. §2000e, 42 U.S.C. §1981, and Mich. Comp. Laws §37.2201 et seq.
6. In consideration of the Employer completely paying and the payments being consummated as provided for in this Agreement, the Employee, for herself, heirs, successors, and assigns, hereby releases, acquits, and forever discharges the Employer, its heirs, agents, subsidiaries, assigns, attorneys, and employees from any and all claims, demands, attorneys' fees, actions, and damages arising out of her termination, which is the subject of the aforesaid EEOC/ MDCR charges.
7. In addition, in like manner and with identical language incorporated herein, the Employer releases the Employee, her heirs, agents, subsidiaries, assigns, attorneys, and employees from any and all claims, demands, attorneys' fees, actions, sanctions, and damages.
8. On or before May 1, 2011, the Employer will pay to the Employee the total amount of \$_____ representing personal injury damages, including pain and suffering, sought under 42 U.S.C. §2000e, 42 U.S.C. §1981, and Mich. Comp. Laws §37.2201 et seq. This \$_____ represents payment for personal injuries. It is not payment for lost wages. A Form 1099 will be issued only to the Employee for this \$_____ payment.
9. In addition, the Employer will make a payment for attorneys' fees. This payment will be made via a \$_____ check payable to only the Employee's attorney, _____, delivered to attorney

_____ at _____ on or before May 1, 2011. A Form 1099 will be issued only to the attorney for this _____ payment.

10. Employee shall resign her employment with the Employer effective October 1, 2010. A copy of the voluntary resignation notice is attached hereto as Exhibit A.

11. The Employer agrees that it will provide neutral references concerning the Employee. The Employer agrees that it will not provide any unfavorable information concerning the Employee to anyone. The neutral reference will indicate as follows: “_____ worked for _____ as a _____ from _____ until she voluntarily left effective October 1, 2010. At the time of her leaving, her hourly rate was \$_____. It is the policy of _____ not to provide further information concerning any employee.”

12. The Employer will provide to the Employee on or before May 1, 2011, a letter on company stationery signed by _____ indicating what is in Exhibit B.

13. In that the Employee has submitted a voluntary letter of resignation, the Employee may represent in future applications and inquiry responses, that she voluntarily quit her employment with the Employer.

14. The Employer will cleanse, purge, and destroy from all its records all documentation concerning or reflecting the Employee’s unemployment compensation proceedings, EEOC/ MDCR proceedings, and adverse information, including, but not limited to, probation, monitoring, discipline, and/or involuntary termination. This does not preclude such documentation being kept in a completely separate file at the offices of the Employer’s outside counsel away from the Employer’s premises.

15. The Employer on or before May 1, 2011, will withdraw with prejudice its request for reconsideration before the Unemployment Compensation Agency via the faxing and mailing of a letter to the UA identical to Exhibit C.

16. The parties agree that they will keep the amount of this Settlement Agreement and Mutual Release confidential, and the amounts of the Settlement Agreement shall not be revealed to anyone other than the parties’ attorneys, tax advisors, taxing authorities, and spouses. Should any person inquire as to the status of the charges or claims of Employee against Employer, the parties agree that they will provide the following, and only the following, response: “The matter has been amicably resolved.”

[Signatures]

Exhibit A

Ladies and Gentlemen:

I voluntarily resign my employment with _____ effective October 1, 2010.

[Signature]

Exhibit B

Dear _____:

We have appreciated your efforts and commitment to _____. Your work performance has enabled us to move to another phase in our growth with the future looking bright.

[Signature]

Exhibit C

Dear Unemployment Agency:

The employer hereby withdraws with prejudice its request for reconsideration of the February 1, 2011, determination, and requests that benefits be granted.

[/s/Employer's Attorney]