

SETTLEMENT AGREEMENT AND GENERAL RELEASE

There is no one size fits all. However, there are some general terms that are usually in the agreement.

Payment Terms. Parties should agree on the amount if money is being paid and the terms of payment. What the money is being paid for should also be explicit, for example, emotional distress, exemplary damages, ADEA waiver, release of stock options.

The specific consideration for payment must be explicit.

If there is a payment schedule over time and interest for deferred payments it should be stated in the agreement.

Releases. The release language should be explicit in the agreement including all parties to be released. Mutual releases are typical but not every resolution is the same.

Claims to be released usually involve the specific lawsuit and any and all other claims under a myriad of statutes and might include the following:

This release includes but is not limited to CLAIMS arising under the Age Discrimination in Employment Act, 26 U.S.C. §626 et seq., Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq., the Civil Rights Act of 1991, as amended, 42 U.S.C. §1981 et seq., the Americans with Disabilities Act, 42 U.S.C. §12101 et seq., the Family and Medical Leave Act, 29 U.S.C. §2601 et seq., the Fair Labor Standards Act, 29 U.S.C. §201 et seq., the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001, et seq., the Securities Act of 1933, 15 U.S.C. §77, et seq., The National Labor Relations Act, 29 U.S.C. §151 et seq., the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, the Uniformed Service Employment and Reemployment Rights Act, 38 U.S.C. §4301, et seq., the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §2101, et seq., the New York Executive Law, §291, et seq., the discrimination and retaliation sections of the New York State disability benefits and workers' compensation laws, New York Labor Law §740, the NYC Human Rights Law, §8-107, any other federal, state or local laws or regulations, and all CLAIMS under any tort or common law, including, but not limited to, any claims for wrongful discharge, breach of contract, violation of public policy, intentional or negligent infliction of emotional distress, defamation, fraud, negligence, and negligent misrepresentation.

Release by the Company. For good and valuable consideration, including without limitation the Employee's release described in this Agreement, the Company and its direct and indirect parents, subsidiaries, and predecessors, and all of its and their respective past and present employees, directors, and covenant not to sue the Employee and the Employee's attorneys, successors, and assigns (individually and collectively the "EMPLOYEE Releasees"), from and with respect to any and all actions, suits, liabilities, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, torts, variances, trespasses, damages, judgments, extents, executions, claims, and demands whatsoever, whether known or unknown, suspected or unsuspected, in law or equity, which against the Employee Releasees, parties to this Agreement, heirs, executors, administrators, successors, assigns, and attorneys, ever had, now have, or hereafter can, shall or may have for, upon or may have for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of the world to the date of this Agreement, including specifically by way of description, but not by way of limitation, any and all claims:

- a. alleged or related to the employment of EMPLOYEE by the Company;
- b. alleged or related to any claim for breach of any common law or contractual duty to the Company;
- c. arising out of or related to any claims the Company may have against EMPLOYEE from the beginning of time to a time to the date of this Agreement;
- d. any and all claims for violation of the federal or any state constitution or Administrative Code or Charter or Penal Code;
- e. any and all claims related to defamation, abuse of process, and/or malicious prosecution;
- f. any and all claims arising out of any other laws and regulations relating to employment discrimination; and
- g. any and all claims for attorney' fees and costs.

Representations and Warranties. A sample provision follows:

The parties each represent, warrant to and agree with the others as follows:

- a. The terms of this Agreement are contractual and are the result of negotiations between the Parties;
- b. This Agreement has been carefully read by each of the Parties after consultation with their respective attorneys or

advisors to the extent they deem appropriate and the contents hereof are known to and understood by each of the Parties. It is signed freely on an informed basis and with due authority by each Party executing this Agreement and is binding and enforceable in accordance with its terms;

c. The Parties agree that the payment/benefits referred to in paragraph 1(a) of this Agreement are to settle all claims which were or could have been asserted by Employee related to his employment with the Company.

d. Employee explicitly agrees to be solely responsible for, and legally bound to make payment of, the taxes, if any, which are determined to be owned (including penalties and interest related thereto) by any taxing authority as a result of any payment that he receives from the Company pursuant to paragraph 1(a) of this Agreement. Employee specifically agrees and understands that neither the Company nor its attorneys has made any representations regarding the tax treatment of the sums paid pursuant to this Agreement, and Employee agrees that he is responsible for determining the tax consequences of such payments and for paying taxes, if any, that may be owned with respect to such payments. In the event a claim for such taxes, and/or penalties and interest, is asserted by any taxing authority, however, Employee agrees to, and does hereby indemnify and hold the Company harmless against any and all tax liability due from Employee or interest and/or penalties as due thereon from the Company or Employee.

Covenants Not to Sue and Dismissal of Pending Actions. Parties need to withdraw the Complaint pending in the appropriate court or administrative agency. Parties also need to clarify whether there are any other pending lawsuits, charges or claims before any other State or Federal Court or any agency or administrative body. Typically the parties agree not to assert any claims, charges or other proceedings against the other or any of the Releasees identified in the Agreement in any form based on any events whether known or unknown occurring prior to the date of the execution of the Agreement.

Confidential and Non-Disclosure. Variations of these terms apply but generally most agreements seek confidentiality and non-disclosure except where necessary to consult with counsel or accountants and other advisors. These provisions can be complex and involve notice to the other party if disclosure needs to take place.

Nondisparagement. This term is usually included and not necessarily always mutual. A sample provision follows:

Employees will not make or solicit any comments, statements, or the like to others or the media that may be considered to be derogatory or detrimental to the good name or business reputations of, it affiliates, or its officers, directors, current and/or former employees, or representatives, including, but not limited to comments about any of the Company's products, services, business or employment practices. Employee will not make or solicit any comments, statements, or the like to others or the media that may be considered to be derogatory or detrimental to the good name reputation of or any of his family members or heirs. This Agreement does not in any way restrict Employee's rights to testify fully and truthfully in any legal action.

Neither _____ will make or solicit any comments, statements, or the like to others or the media that may be considered to be derogatory or detrimental to the good name reputation of Employee. This Agreement does not in any way restrict the rights of _____ and the Company to testify fully and truthfully in any legal action.

Employment/Re-Employment Rights. Employee hereby waives any and all rights to employment or re-employment with the Company. Employee agrees that the Company has no obligation, contractual or otherwise to employ or re-employ him, now or in the future, either directly or indirectly, on a full-time, part-time, or temporary basis, including, but not limited to, utilizing him services as a temporary employee, worker, or contractor through any temporary service providers, vendors, or agencies. Employee agrees that any attempt to obtain employment with the Company will constitute a breach of this Agreement and that the Company may rely upon the breach in refusing to employ, re-employ or contract with him or in discharging him from employment.

Reference and Verification of Employment. Party should be explicit if a reference is to be provided. The name of a contact person should also be provided and if only name, rank and serial number are to be provided the agreement should so state.

Benefits. Typically the parties will detail what, if any, benefits including health and other are included.

Agreement to Cooperate. A sample follows:

Employee agrees to fully cooperate in connection with any pending or future proceeding in which Employee's cooperation is believed by the Company to be necessary, including to meet with counsel for the Company, to provide relevant documents, or to appear to a deposition, trial or other hearing, and, to the best of his ability, provide accurate, truthful and thorough testimony. To the extent Employee suffers any reasonable wage loss or reasonable costs for such cooperation, Company shall promptly reimburse him within thirty (30) days of receiving written proof of Employee having incurred these reasonable lost wages and/or reasonable costs. Further, Company shall full indemnify Employee for any actions he takes pertaining to this paragraph.

Choice of Law and Venue. Agreements are usually specific with regard to where, when and how claims can be filed. Typically in New York the law of the State of New York applies and venue might be in New York County or New York City or wherever the parties so state.

Enforcement. If parties opt for an arbitration provision the clause should be carefully thought through and provide the same venue and choice of law provisions and what provider if any. For example, AAA and other entities administer arbitration services.

Signatures and Release. All parties to the Agreement should sign the agreement. If there is a waiting period because it is a claim under the Age Discrimination in Employment Act the waiting period should be specified. For example 21/7 or 45 days in a large group layoff.

The above are merely illustrative of terms that might be in a Settlement Agreement regarding a mediation.

Perhaps a Settlement checklist would be helpful.

I often suggest to parties that they come to the mediation with a proposed form of agreement on their laptop so that if and when we reduce the agreement to writing we are prepared to do it at the session.

In the event we are not able to do so, I always urge the parties to hand write a Memorandum of Agreement at a minimum.