THE FLORIDA BAR

LABOR AND EMPLOYMENT LAW SECTION

Yvette D. Everhart, 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

SEVERANCE/SEPARATION AGREEMENT CONSIDERATIONS[1]

I. LEGAL CONSIDERATIONS:

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

1. Waiving Title VII. To be bound by an agreement waiving claims under Title VII of the Civil Rights Act of 1964 ("Title VII"), 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. Circumstances. 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

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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.
    - 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).
- The clarity of the agreement.
- Plaintiff's opportunity to consult with an attorney.
- Employer's encouragement or discouragement of consultation with an attorney.
- The consideration given in exchange for the waiver compared with the vested benefits the employee foregoes.

B. **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 of 1938 ("FLSA").

1. Reasonable Compromise. 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. Approval. 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

   - However, 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); *see also Lolether Crooms v. Lakewood Nursing Center, Inc.*, 2008 WL 398933 (M.D. Fla. 2008).

3. Claims Not Moot. 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).

4. General Release/Confidentiality/Non-Disparagement Issues.

   a. 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).

   b. 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).

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

violation of the First Amendment).

C. **FMLA Considerations**. Since the Family and Medical Leave Act of 1993, as amended ("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 U.S. Department of Labor. 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).

D. **ADEA/OWBPA**.

1. Waiver. Under the Older Workers Benefit Protection Act of 1990 ("OWBPA"), an employee or former employee cannot waive any right or claim under the Age Discrimination in Employment Act of 1967 ("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 is 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. An employee does not ratify an otherwise unenforceable ADEA release by retaining any settlement monies. In January 1998, the U.S. 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).

E. **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 under the National Labor Relations Act of 1935 ("NLRA").

- *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 constitutes an unfair labor practice and violates 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 National Labor Relations Board ("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 protected activities pursuant to Section 7 of the Act. However, the Fifth Circuit Court of Appeals rejected the NLRB's decision in *D.R.*

[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)(1)(H)(ii). 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.

Horton, 737 F.3d 344 (5th Cir. 2013). *Murphy Oil* re-affirmed its decision in *D.R. Horton*.

F. **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.

II. 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. EEOC. Recently the U.S. Equal Employment Opportunity Commission ("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.
    a. The types of provisions the EEOC may find unlawful include confidentiality provisions, cooperation clauses, non-disparagement clauses, general release of claims, and covenant not to sue clauses.
    b. Specifically, the EEOC alleged that these types of provisions in severance agreements deterred employees from filing charges of discrimination and prevented an 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.
    c. 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.

- *EEOC v. CollegeAmerica Denver, Inc*., Case No. 14-CV-1232, 2014 U.S. Dist. LEXIS 167333 (D. Colo. Dec. 2, 2014) (dismissed on procedural grounds).

- *EEOC v. CVS*, Case No. 1:14-cv-00863 (N.D. Ill. Feb. 7, 2014) (dismissed on procedural grounds, not the merits).

- *EEOC v. Baker & Taylor*, Civil Action No. 13-3729 (N.D. Ill. 2013) (case 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).

2. SEC. The U.S. Security and Exchange Commission, Office of the Whistleblower ("SEC"), has similarly been scrutinizing employment contracts that attempt to discourage employees from reporting wrongdoing to the SEC or provisions in such agreements that could have a chilling effect on employee's communications with the SEC or related governmental agencies. The types of provisions that the SEC may find problematic include non-disclosure agreements, confidentiality agreements and/or non-disparagement agreements. SEC Rule 21F-17, 17 C.F.R. §240.21F-17(a) states:

> No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement (other than agreements dealing with information covered by §240.21F-4(b)(4)(i) and §240.21F-4(b)(4)(ii) of this chapter related to the legal representation of a client) with respect to such communications.

3. NLRB. The NLRB may also attack provisions in separation agreements, such as non-disparagement provisions, confidentiality, cooperation provisions and the like, that

restrain or interfere with an employee's rights to engage in concerted protected activity or other Section 7 rights.

B. 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.")

C. 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).

D. 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 a

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).