

Parting Ways Professionally: Key Considerations in Drafting Separation Agreements

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When it comes to agreements governing an employee's separation from employment, the fine print matters—and in New York, that print has recently become even finer. Courts across the state have enforced tightened requirements on what employers must do to draft valid separation agreements, applying new statutes governing confidentiality clauses and strictly enforcing consideration and revocation timelines. Gone are the days of dusting off a boilerplate separation agreement template. In this article, we analyze and distill several recent developments in New York concerning separation agreements and provide some practical guidance to employers seeking to draft strong agreements.

Confidentiality Clauses

To begin, General Obligations Law § 5-336(3)(b), enacted in 2023, invalidates the “release of any claim, the factual foundation for which involves unlawful discrimination, including discriminatory harassment, or retaliation...if as part of the agreement resolving such claim...the complainant is required to forfeit all or part of the consideration for the agreement, for violation of a nondisclosure clause or non-disparagement clause.” Practitioners have questioned whether, in light of this rule employers may continue to include in their separation agreements confidentiality clauses intended to protect their trade secrets and confidential information, or if the statute should now be read to ban such clauses if the separation agreement includes a release of discrimination, harassment, or retaliation claims.

A recent New York case answers these questions. In *Corcino v. N.Y. Times Co.*, 2026 N.Y. Misc. LEXIS 2748, *1 (Sup. Ct. N.Y. Cnty. Apr. 7, 2026), the court evaluated whether a separation agreement containing non-disclosure and non-disparagement clauses remained enforceable even when the plaintiff entered the agreement following plaintiff's allegations of employment discrimination and retaliation. The court upheld the non-disclosure and non-disparagement clauses because the agreement expressly stated that the employee could still reveal the underlying facts or circumstances of claims of discrimination. The court reasoned that the law “was never intended to make all non-

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disclosure and non-disparagement clauses, such as those pertaining to trade secrets and proprietary information, unenforceable.” Instead, the “legislative intent was to make unenforceable certain non-disclosure and non-disparagement clauses that imposed liquidated damages on a complainant for disclosing facts related to retaliation, discrimination, or harassment.”

Drafting Implications

The *Corcino* case holds that attorneys can continue to include non-disclosure and confidentiality clauses in separation agreements that include releases of claims of discrimination, harassment, and retaliation, so long as such clauses do not prevent disclosure of the underlying facts of the wrongful conduct or impose a liquidated damages clause. Assuming an employee has previously asserted a “claim” of discrimination, harassment, or retaliation prior to executing the separation agreement, practitioners would be prudent to include language in the agreement stating explicitly that the employee retains the right to disclose the underlying facts and circumstances of such claims. Employers similarly may wish to make explicit that no liquidated damages or financial penalties attach to such disclosure.

If an employer wishes to enter a nondisclosure agreement with a departing employee with respect to the factual basis for claims of discrimination, harassment, or retaliation, the law provides a mechanism for the employer to do so. Under 5-336(b), an employer and employee may agree to such a condition “in writing...in plain English,” provided that the employee receives “up to twenty-one days to consider such term or condition” and that the employee’s preference for confidentiality is “memorialized in an agreement signed by all parties” and revocable for “at least seven days following the execution of such agreement.”

Group Terminations

Separate and apart from confidentiality clauses, a number of recent New York cases have clarified how courts evaluate group terminations. As employment lawyers know, the Older Workers Benefit Protection Act (OWBPA) imposes strict procedural requirements for a valid the Age Discrimination in Employment Act (ADEA) waiver. Generally, the OWBPA requires individuals to, among other things, receive at least 21 days to consider the separation agreement and seven days to revoke the agreement containing the waiver following its execution. The absence of these procedural requirements invalidates the separation agreement in its entirety. However, several recent cases raise an additional pitfall that employers must consider: What happens when an employer terminates the employment of a group of employees?

Under the OWBPA, when there is a “group termination”, the employer must give the employees 45 days to consider the proposed separation agreement rather than 21 days, and the employer also must provide the employees with certain details about the so-called “termination program” under which the separation occurs. The definition of “group termination” is critical for employers to understand to comply with the statute, but the statute itself is silent as to what constitutes a “group termination.”

The case of *Gerrits v. IBM Corp.*, 2022 U.S. Dist. LEXIS 93321, *4 (S.D.N.Y. May 24, 2022) clarified the definition of group termination. There, the court held that indicia of “group” terminations include the use of a standardized formula or package of employee benefits that is available to more than one employee; lack of negotiation between the parties; and advisement from the employer that the termination is not a function of the employee’s individual status. The court further observed that normally one would expect an employer to provide a package of benefits to two or more employees for the termination to be part of a “group termination” as that term is used in the statute.

In *Gerrits*, plaintiffs failed to make this showing. The court noted that plaintiffs were terminated individually over a period of years with no apparent groupings or waves of terminations or other unifying factors. In addition, the employer gave each employee “a specific, individualized reason for his or her termination.”

When drafting separation agreements employers also should keep in mind that drafting a valid ADEA release may not be enough to shield the employer from discovery in the event of litigation over alleged discrimination in connection with a termination of employment. For example, in *Dale v. L’Oreal USA, Inc.*, 2023 U.S. Dist. LEXIS 102693 (E.D.N.Y. Jun. 13, 2023) a valid ADEA release was not enough for the employer to escape discovery into the facts underlying a purported group termination. In *Dale*, the court considered the parties’ separation agreement and supplemental release but found that it could not conclude from those documents at the motion to dismiss stage that plaintiff’s release of any ADEA claims pursuant to that agreement was knowing and voluntary, pursuant to the specific requirements of the ADEA. The court found that the separation agreement appeared to comply with many of the ADEA’s requirements. However, the court could not decide “without discovery whether the list of affected employees that Defendant provided as an exhibit to the Separation Agreement was accurate and conveyed all of the information required by the ADEA.”

Drafting Implications

To optimize separation agreements for individual employees, employers would be prudent to give each employee the reason for the termination of employment. Employers further would be well served to individualize the separation packages and benefits offered to individual employees to avoid any appearance that the terminations were connected where no actual connection existed in the separate termination decisions.

As for group terminations, employers should comply with the OWBPA and ADEA, which require employers to include, among other things, details concerning the “termination program” governing the offer of severance benefits. Employers should be prepared for litigants who may seek to demand discovery into the termination program even if the separation agreement satisfies all statutory requirements. For larger terminations, employers also should confirm compliance with other laws, such as the Worker Adjustment and Retraining Notification Act of 1988 (WARN Act), to determine whether the group termination satisfies any separate legal requirements that may exist.

Two-Stage Releases

Another common scenario that arises when employers are drafting separation agreements is when an employer terminates the employment of an employee who will continue to work for the employer after the employee executes the separation agreement. In such circumstances, employers frequently structure their separation agreements to include two parts. The first part involves the employee signing the separation agreement, including the release of claims, during employment. The second part involves the employee signing a document that updates the period covered by the release of claims following completion of the employee's period of employment and subsequent termination of employment.

The two-stage release structure serves an important function. Because separation agreements that comply with the OWBPA may not release claims arising in the future, the agreement will typically include releases of claims arising up to the date that they were signed. The second document, on or after termination of employment, updates the release of claims to capture any claims arising after the signing of the original separation agreement but before termination of employment and reaffirms the parties' intent to achieve a global resolution of any disputes relating to termination of employment. See, e.g., *Nelson v Lattner Enters. of N.Y.*, 108 A.D.3d 970 (3d Dep't 2013) (employee executed two release agreements on two separate dates).

Drafting Implications

When using this structure, employers frequently draft one agreement containing the complete terms of the separation agreement including a clear specification of the consideration for the release of claims. That initial agreement will typically provide that the employee will sign the first agreement during employment, and that the employee will sign a second document that updates the release of claims no earlier than the employee's last day of employment. The agreement will condition delivery of any severance pay or benefits on the signing and effective date of both the initial agreement and the document updating the release of claims.

Conclusion

Separation agreements and releases remain powerful tools for employers seeking to resolve or minimize employment disputes without litigation. But to obtain that benefit, employers should be aware that courts scrutinize these agreements carefully, and statutory protections continue to evolve. New York's GOL § 5-336 restricts confidentiality and non-disparagement clauses in discrimination cases, but it does not eliminate them—employers may still protect trade secrets, proprietary information, and settlement terms so long as employees retain the right to disclose the underlying facts of discrimination. The OWBPA imposes strict requirements for ADEA waivers, with heightened obligations for group terminations. And strategic use of two-stage separation agreements can capture all claims through the final separation date, provided that the separation agreement is knowingly, voluntarily signed, and supported by adequate consideration.

Employers and their counsel would be prudent by drafting their separation agreements with precision, maximizing compliance with applicable statutes, providing employees with the information and time needed to make informed decisions, and building a record that will withstand judicial review. These practices strengthen enforceability and reduce litigation risk.

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