

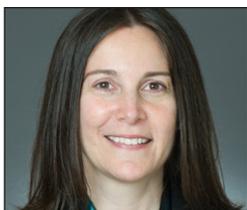
Two Dozen Suggestions for Drafting Separation Agreements and Releases

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Peter M. Panken is a Member of Epstein Becker & Green's Employment, Labor & Workforce Management practice, in the firm's New York office. He represents management in a wide range of industries on all aspects of employment and

union-related matters as well as disability issues. For over 30 years Mr. Panken has chaired ALI national programs on Labor and Employment Law. A life member of the American Law Institute, Mr. Panken has been selected for inclusion in The Best Lawyers in America® (1989 to 2017), as well as in The International Who's Who of Business Lawyers, Who's Who in America, Who's Who in the East, Who's Who Legal, and Who's Who in the World. Mr. Panken was also named to the New York Metro Super Lawyers list (2006 to 2016).



Susan Gross Sholinsky is a Member of Epstein Becker & Green's Employment, Labor & Workforce Management practice, in the firm's New York office. She counsels clients in a practical and straightforward manner, with an eye toward

reducing employment-related claims. Ms. Sholinsky serves on the adjunct faculty of the Cornell University School of Industrial and Labor Relations, where she teaches courses concerning human resources and the law. Ms. Sholinsky is a member of the firm's Finance and Labor & Employment Steering Committees, and is a Vice Chair of the Firm's Diversity and Professional Development Committee. She also serves on the Executive Committee of the firm's Women's Initiative.



Nancy L. Gunzenhauser is an associate in Epstein Becker & Green's Employment, Labor & Workforce Management practice, in the firm's New York office. Ms. Gunzenhauser counsels clients on compliance with EEO laws, the ADA, FMLA,

worker classification issues, and other laws governing the workplace. Ms. Gunzenhauser speaks at webinars and writes articles on employment laws and issues. She is a member of the Firm's practice industry groups on Retail and Technology, Media & Telecommunications.

Peter M. Panken, Susan Gross Sholinsky, and Nancy L. Gunzenhauser

RELEASES OF EMPLOYMENT-RELATED CLAIMS must be knowing, voluntary and entered into for valuable consideration in order to be valid and enforceable. In other words, the employee must receive consideration above and beyond what he or she is otherwise entitled to receive.

Further, in order to ensure releases in cases arising under the Older Workers Benefit Protection Act, ("OWBPA"), which amended the Federal Age Discrimination in Employment Act ("ADEA"), will be enforceable, they must necessarily contain language that is tailored to the requirements of the OWBPA. This article, while not intended to be exhaustive, provides sample language and suggestions for several such clauses, including, among others:

- Spelling out the consideration, lump sum or salary continuation and making clear that the terminnee only receives such benefits if he/she complies with the Agreement;
- Spelling out as many laws as may be applicable;
- Making sure that nobody is overlooked and that the release covers everyone; and
- For higher corporate executives or highly compensated individuals, including an IRS 409(a) clause.

As in all cases with sample language, these are to be considered as general suggestions only. Your specific situation will undoubtedly have nuances that will require changes. In addition, it is vital to be sure there have not been changes in the law at the time an individual release is drafted. Indeed, in light of the number and scope of

pronouncements by various governmental agencies and regulatory authorities, employers should review the content.

1. Make Clear, Either at the Beginning or End of a Release, that Employees Know they are Giving Up Rights

BY SIGNING THIS AGREEMENT AND GENERAL RELEASE YOU GIVE UP AND WAIVE IMPORTANT LEGAL RIGHTS.

NOTE: In order to ensure that the release will be deemed knowing and voluntary, if challenged, you also may wish to advise terminatees to seek legal counsel:

CONSULT WITH AN ATTORNEY PRIOR TO SIGNING THIS AGREEMENT AND GENERAL RELEASE.

2. Call the Document an “Agreement and General Release”

I, _____, understand and, of my own free will, enter into this AGREEMENT AND GENERAL RELEASE (“AGREEMENT”) with _____ (the “COMPANY”) and, in consideration of the severance and termination payment (collectively “termination benefit”) described herein, agree as follows:

3. Spell out Date of Termination of Employment and, if Desired, Agree Not To Reapply for Employment

I hereby acknowledge that my employment with the COMPANY terminated on _____, 201_, and agree that I will not hereafter apply for or seek employment or reemployment with the COMPANY.

NOTE: Certain governmental agencies do not like to see no-rehire/no-reapply clauses. As such, employers may wish to include them only if the employee has made a legal claim, and not, for example, where the employee’s employment has ended in connection with a reduction in force.

4. Spell out the Consideration (Lump Sum Payment, Salary Continuation, or other Payments or Benefits), and Make Clear That the Terminee Only Receives Such Benefits if He/She Complies with The Agreement

On _____, 2016 officials of the COMPANY informed me of what I had a right to receive upon the termination of my employment, and explained to me that in addition to those rights, the COMPANY will [give me a lump sum payment of \$_____] [continue my salary for a period of __ weeks] [provide payments in connection with the continuation of health insurance benefits pursuant to COBRA for a period of up to ## months], less deductions required by law, as a termination benefit, if, and only if, I sign this AGREEMENT and comply with its terms. I understand that the COMPANY will not be required to provide the termination benefit until after this AGREEMENT becomes effective.

5. Include a Non-admission Clause

I understand that this AGREEMENT does not constitute an admission by the COMPANY of any: (i) liability; (ii) violation of any federal, state or local law, regulation, order or other requirement of law; (iii) breach of contract, actual or implied; (iv) commission of any tort; or (v) other civil wrong.

6. Spell out as Many Laws as May Be Applicable

I realize there are many laws and regulations prohibiting employment discrimina-

tion retaliation for opposing unlawful acts or otherwise regulating employment or claims related to employment pursuant to which I may have rights or claims. These include, without limitation, Title VII of the Civil Rights Act of 1964, as amended, including the Equal Employment Opportunity Act of 1972; the Equal Pay Act of 1963; the Age Discrimination in Employment Act of 1967, as amended (the “ADEA”); the Older Workers Benefit Protection Act of 1990; the Americans with Disabilities Act of 1990; the Genetic Information Nondiscrimination Act of 2008; the National Labor Relations Act, as amended; the Employee Retirement Income Security Act of 1974, as amended; the Civil Rights Act of 1991; the Family and Medical Leave Act of 1993; the Worker Adjustment and Retraining Notification Act of 1988; the Civil Rights Act of 1866, 42 U.S.C. §1981;

_____ [TITLE OF STATE AND LOCAL ANTI-DISCRIMINATION LAWS], and federal, state and local human rights, fair employment and other laws. I also understand there are other statutes and laws of contract and tort otherwise relating to my employment. I intend to waive and release any rights I may have under these and other laws, and under laws of contract and tort, but I do not intend to nor am I waiving any rights or claims that may arise under the ADEA after the date that I sign this AGREEMENT.

7. Release Everything Except Claims Arising After the Date the Agreement Is Signed (which Means that the Release Should Be Signed On or After the Termination Date), and Before the Consideration Is Paid. Include Agreement that if Terinee Does Sue, He/She Will Pay the Company’s Legal Fees

In exchange for my receipt of the termination benefit, on behalf of myself, my

heirs and personal representatives, I release and discharge the COMPANY from any and all charges, claims and actions arising out of my employment or the termination of my employment with the COMPANY, except a charge, claim or action based upon rights or claims that may arise after the date that I sign this AGREEMENT. If I violate this AGREEMENT by filing or bringing any charges, claims or actions contrary to this Paragraph, (except for filing a charge or complaint with the Equal Employment Opportunity Commission or other administrative agency), in addition to any other remedies which may be available to the COMPANY, including, but not limited to, remedies for breach of contract, I will pay all costs and expenses of the COMPANY in defending against such charges, claims or actions brought by me or on my behalf, including reasonable attorney’s fees.

NOTE: Another alternative is more complex and less understandable but more of a general release:

In consideration of the payment described above and for other good and valuable consideration, you hereby release and forever discharge, and by this instrument release and forever discharge, the COMPANY from all debts, obligations, promises, covenants, agreements, contracts, endorsements, bonds, controversies, suits, actions, causes of action, judgments, damages, expenses, claims or demands, in law or in equity, which you ever had, now have, or which may arise in the future, regarding any matter arising on or before the date of your execution of this Agreement, including but not limited to all claims (whether known or unknown) regarding your employment at or termination of employment from the COMPANY any contract (express or implied), any claim

for equitable relief or recovery of punitive, compensatory, or other damages or monies, attorneys' fees, any tort, and all claims for alleged discrimination based upon age, race, color, sex, sexual orientation, marital status, religion, national origin, handicap, disability, or retaliation, including any claim, asserted or unasserted, which could arise under Title VII of the Civil Rights Act of 1964, as amended, including the Equal Employment Opportunity Act of 1972; the Equal Pay Act of 1963; the Age Discrimination in Employment Act of 1967, as amended (the "ADEA"); the Older Workers Benefit Protection Act of 1990; the Americans with Disabilities Act of 1990; the Genetic Information Nondiscrimination Act of 2008; the National Labor Relations Act, as amended; the Employee Retirement Income Security Act of 1974, as amended; the Civil Rights Act of 1991; the Family and Medical Leave Act of 1993; the Worker Adjustment and Retraining Notification Act of 1988; the Civil Rights Act of 1866, 42 U.S.C. §1981; [INSERT STATE AND LOCAL LAWS]; and any other federal, state or local laws, rules or regulations, whether equal employment opportunity laws, rules or regulations or otherwise, or any right under any COMPANY pension, welfare, or stock plans.

8. Consider a Trade Secrets Clause and Possibly a Non-Compete Clause

You acknowledge the time and expense incurred by the COMPANY in the development and accumulation of trade secrets, confidential information, proprietary information and experience concerning its operations and the development and sale of its products and services. You further acknowledge that by reason of your employment, you were in a confidential relationship with

the COMPANY and had access to trade secrets and confidential information of the Company, its affiliates, customers, clients and prospective clients. You will not at any time, except as directed or permitted by the COMPANY in writing, disclose or allow to be disclosed to any person, firm, corporation or entity any trade secrets or confidential information concerning the business of the COMPANY and its customers, or in any way utilize the trade secrets or confidential information concerning the business of the COMPANY for your own benefit or the benefit of others. Trade secrets and confidential information include, without limitation, business prospects, financial data and reports, marketing and sales plans, strategies and procedures, prospective business alliances, affiliations and acquisitions (including, without limitation, the identities of and any other information concerning possible acquisition candidates), operational techniques and know how, software, source codes, business plans and systems, quality control plans and systems and any other information regarding the COMPANY or its affiliates or clients, whether imparted to you by the COMPANY or its clients or obtained by you in the course of your employment, that is not accessible to the general public, whether or not marked confidential or proprietary. You further understand that the COMPANY has received from third parties their confidential information subject to a duty on the COMPANY's party to maintain the confidentiality of such information and to use it only for certain limited purposes. You shall hold all such confidential information in the strictest confidence, and shall not disclose or use such information.

NOTE: If you would like to take advantage of the Defend Trade Secrets Act of 2016's benefits (including

direct access to federal court and the potential for punitive damages and attorneys' fees), you will need to include a disclaimer referencing the statutory language or refer to a separate policy containing such statutory language.

Pursuant to the Defend Trade Secrets Act of 2016, an individual may not be held criminally or civilly liable under any federal or state trade secret law for the disclosure of a trade secret that: (a) is made (i) in confidence to a federal, state, or local government official, either directly or indirectly, or to an attorney; and (ii) solely for the purpose of reporting or investigating a suspected violation of law; or (b) is made in a complaint or other document that is filed under seal in a lawsuit or other proceeding. Further, an individual who files a lawsuit for retaliation by an employer for reporting a suspected violation of law may disclose the employer's trade secrets to the attorney and use the trade secret information in the court proceeding if the individual: (a) files any document containing the trade secret under seal; and (b) does not disclose the trade secret, except pursuant to court order.

9. Be Sure the Release Covers Everyone

As used in this AGREEMENT, the COMPANY includes its parents, subsidiaries, affiliates and divisions and it and their respective: (i) predecessors, successors and assigns and (ii) past and present directors, officers, representatives, shareholders, agents, employees and their respective heirs and personal representatives of any of them.

NOTE: Be sure the release of company officials covers everyone; however, be careful that the Company as a whole and its employees are not mutually releasing the terminnee.

10. Consider a Confidentiality Clause

I will not at any time talk about, write about or otherwise publicize the terms or existence of this AGREEMENT or any fact concerning its negotiation, execution or implementation. I will not testify or give evidence in any forum concerning my employment or termination of employment with the COMPANY unless required by law or requested to do so in writing by an authorized official of the COMPANY.

NOTE: Terminnees usually want to be sure they can share the terms of the agreement with their family, attorneys and tax advisers. Further, in light of governmental agencies and regulators' concerns that employees need to be made aware that confidentiality provisions will not preclude them from communicating confidential information with the agencies/regulators, consider the following:

You agree not to disclose the terms, contents or execution of this Agreement, the claims that have been or could have been raised against the COMPANY, or the facts and circumstances underlying this AGREEMENT, except you may make such disclosures: (a) to your immediate family, tax advisors, or taxing authorities, so long as such person or entity agrees to be bound by the confidential nature of this AGREEMENT; (b) to your legal counsel; (c) pursuant to the order of a court; (d) while engaging in the activities referenced in paragraph [include a reference to the paragraph relating to the right to participate in investigations by governmental agencies] of this AGREEMENT; and/or (e) for purposes of securing enforcement of the terms and conditions of this AGREEMENT, should that ever be necessary.

11. Add a Non-disparagement Clause

I will not at any time disparage or denigrate the COMPANY, orally or in writing, or issue

any communication, written or otherwise, that reflects adversely on or encourages any adverse action against the COMPANY, except: (a) if testifying truthfully under oath pursuant to any lawful court order or subpoena, (b) otherwise responding to or providing disclosures required by law, or (c) while engaging in the activities referenced in paragraph [include a reference to the paragraph relating to the right to participate in investigations by governmental agencies] of this AGREEMENT.

NOTE: Terminatees often ask for mutual non-disparagement clauses. This creates problems if it binds fellow employees and other corporate insiders who may be difficult to police. One possibility is to agree on a reference letter. That is generally appropriate for RIFs because it is easy to say truthfully that the individual is out of work only because a particular operation shut down or slimmed down. But it is important to be consistent with employer policies which often limit references to title held and dates of employment. Additionally, it becomes more problematic if there is an element of bad performance in the termination. Another possibility is to agree to instruct only certain employees to not disparage the terminatee. The employer fulfills the obligation through the instruction, and is not otherwise held liable if the instructed employees disparage the terminatee.

12. Have the employee confirm that he or she has received all payments and benefits to which he or she is entitled.

You represent, warrant and acknowledge that the COMPANY owes you no wages, commissions, bonuses, sick pay, personal leave pay, severance pay, vacation pay or other compensation or benefits or payments or form of remuneration of any kind or nature, other than that specifically provided for in this Agreement.

13. Savings Clause – Ensure Employees are Informed that the Agreement will Not Preclude

Them From Communicating with Governmental Agencies or Regulatory Authorities

Nothing in this Agreement, including but not limited to, paragraphs [reference paragraphs such as the release of claims, representation that no charges or suits have or will be filed (if such a paragraph is included), confidentiality, non-disparagement, and cooperation,], shall prohibit or restrict you (or your attorney) from filing a charge, testifying, assisting, or participating in any manner in an investigation, hearing or proceeding; responding to any inquiry; or otherwise communicating with, any administrative or regulatory (including any self-regulatory) agency or authority, including, but not limited to, the Securities and Exchange Commission (SEC), the Financial Industry Regulatory Authority (FINRA), the Commodity Futures Trading Commission (CFTC), the Consumer Financial Protection Bureau (CFPB), the US Department of Justice (DOJ), the US Congress, any agency Inspector General, the Equal Employment Opportunity Commission (EEOC) and the National Labor Relations Board (NLRB).

14. For Higher Corporate Executives or Highly Compensated Individuals, Include an IRS 409(a) Clause

The COMPANY may deduct or withhold from any compensation or benefits any applicable federal, state or local tax or employment withholdings or deductions resulting from any payments or benefits provided under this AGREEMENT. In addition, it is the COMPANY'S intention that all payments or benefits provided under this AGREEMENT comply with Section 409A of the Internal Revenue Code of 1986, as amended (the "Code"), including without limitation the six month delay

for payments of deferred compensation to “key employees” upon separation from service pursuant to Section 409A(a)(2)(B)(i) of the Code (if applicable), and this AGREEMENT shall be interpreted, administered and operated accordingly. If under this AGREEMENT an amount is to be paid in installments, each installment shall be treated as a separate payment for purposes of Treasury Regulation Section 1.409A-2(b)(2)(ii). Notwithstanding anything to the contrary herein, the COMPANY does not guarantee the tax treatment of any payments or benefits under this AGREEMENT, including without limitation under the Code, federal, state, local or foreign tax laws and regulations. In no event may you, directly or indirectly, designate the calendar year of any payment under this AGREEMENT. In the event the period of notice and payment referenced in this AGREEMENT ends in the taxable year following your termination of employment, any severance payment or deferred compensation payment shall be paid or commence in such subsequent taxable year if required under Section 409A of the Code.

15. Include an Agreement To Cooperate with the Company in Subsequent Litigations, Disputes, and Investigations

You agree that you will assist and cooperate with the COMPANY, including its legal counsel, in connection with the defense or prosecution of any claim that may be made against or by the COMPANY, or in connection with any ongoing or future investigation or dispute or claim of any kind involving the COMPANY, including any proceeding before any arbitral, administrative, judicial, legislative, or other body or agency, including testifying in any proceeding to the extent such claims,

investigations or proceedings relate to services performed or required to be performed by you, pertinent knowledge possessed by you, or any act or omission by you. You further agree to perform all acts and execute and deliver any documents that may be reasonably necessary to carry out the provisions of this paragraph.

16. Include a Termination of Prior Agreements Clause

This AGREEMENT constitutes the entire agreement between the COMPANY and you, and supersedes and cancels all prior and contemporaneous written and oral agreements, if any, between the COMPANY and you. You affirm that, in entering into this AGREEMENT, you are not relying upon any oral or written promise or statement made by anyone at any time on behalf of the COMPANY.

Note: Employers should be mindful that there may be agreements that should survive, such as those pertaining to non-competition, non-solicitation, and inventions, in which case, a carve-out, specifically referencing those agreements, should be included.

17. Bind the Terminee’s Successors and Assigns

This AGREEMENT is binding upon you and your successors, assigns, heirs, executors, administrators and legal representatives.

18. Consider a Jurisdiction and Venue Provision

This AGREEMENT shall be deemed to have been made within the County of _____, State of _____, and shall be interpreted, construed and enforced in accordance with the laws of the State of _____ and before the Courts

of the State of _____ in the County of _____. I hereby consent to the jurisdiction of such Courts for the enforcement of this AGREEMENT and waive trial by jury.

NOTE: Some states do not permit choice of law provisions that utilize laws of states other than the state where the individual was employed. Other states do not permit a choice of law where there is no nexus for the employee or the employer. Review your agreement with counsel to ensure the agreement complies with all state and local laws.

19. Illegality and Severability

If one or more provisions or terms of this AGREEMENT shall be ruled void or unenforceable, the COMPANY may elect to enforce the remainder of this AGREEMENT, or cancel it and get back from me, my successors or assigns or otherwise any consideration paid.

20. OWBPA and ADEA Waiver Requirements

Without detracting in any respect from any other provision of this AGREEMENT:

- a. You, in consideration of the termination benefit provided to you as described in paragraph _ of this AGREEMENT, agree and acknowledge that this AGREEMENT constitutes a knowing and voluntary waiver of all rights or claims you have or may have against the COMPANY assetforth herein, including, but not limited to, all rights or claims arising under the Age Discrimination in Employment Act of 1967, as amended (“ADEA”), including, but not limited to, all claims of age discrimination in employment and all claims of retaliation in violation of the ADEA; and you have no physical or mental impairment of any kind that has interfered with your ability

to read and understand the meaning of this AGREEMENT or its terms, and that you are not acting under the influence of any medication or mind-altering chemical of any type in entering into this AGREEMENT.

- b. You understand that, by entering into this AGREEMENT, you do not waive rights or claims that may arise after the date of your execution of this AGREEMENT, including without limitation any rights or claims that you may have to secure enforcement of the terms and conditions of this AGREEMENT.
- c. You agree and acknowledge that the consideration provided to you under this AGREEMENT is in addition to anything of value to which you are already entitled.
- d. You are hereby advised to consult with an attorney prior to executing this AGREEMENT.

You acknowledge that you were informed that you had at least [twenty-one (21) OR forty-five (45)] days in which to review and consider this AGREEMENT [only include in group terminations:, to review the information as required by the ADEA, a copy of such information being attached to and made part of this AGREEMENT,] and to consult with an attorney regarding the terms and effect of this AGREEMENT.

21. OWBPA Timing Clauses [if Some Aspects of the ADEA’s Timing Requirements are Included in Section 20 above—No Need To Duplicate These]

I was given a copy of this AGREEMENT on _____, 201_. I have had an opportunity to consult an attorney before

signing it and was given a period of at least [twenty-one (21) OR forty-five (45)] days, or until _____, 201_ to consider this AGREEMENT. I acknowledge that in signing this AGREEMENT, I have relied only on the promises written in this AGREEMENT and not on any other promise made by the COMPANY.

I have seven (7) days to revoke this AGREEMENT after I sign it. This AGREEMENT will not become effective or enforceable until seven (7) days after the COMPANY has received my signed copy of this AGREEMENT.

NOTE: For group terminations involving two or more employees, employees who are 40 years of age or older must receive 45 days to review the agreement and seven days to revoke their signature. For individual terminations of an employee who is 40 years of age or older, the employee must receive 21 days to review the agreement and a seven-day revocation period. Employees who are under 40 years of age (whether individually terminated or in a group termination) do not need to be provided with a specific time period to review the agreement OR the seven-day revocation period. However, such individuals should be provided with a reasonable period of time to review and consider the agreement.

22. No Oral Modifications

This AGREEMENT may not be modified or changed orally.

23. Some More Belts and Suspenders, Including Terminee’s and Company’s Signature Lines

Please write the following in the space provided if it is true:

I have read this AGREEMENT AND GENERAL RELEASE and I understand all of its terms. I enter into and sign this AGREEMENT AND GENERAL

RELEASE knowingly and voluntarily, with full knowledge of what it means.

[Insert Space in this clause for Terminee to write the statement, and signature lines signatures for Terminee, Company Representative, and consider requiring that the employee’s signature be notarized]

24. OWBPA Disclosure Requirements for Group Termination or Severance Programs

The following information is provided in accordance with the ADEA:

1. The decisional unit is [COMPANY’S] _____ Department.
2. All employees in the _____ Department are eligible for the program. All employees in this group whose employment terminated in [MONTH(S)/YEAR] are selected for the program.
3. All employees in the _____ Department who are being offered consideration under a waiver agreement and asked to waive claims under the ADEA must sign the Agreement and the Release and return them to [COMPANY REPRESENTATIVE] by [45 DAYS AFTER RECEIPT OF AGREEMENT] (which will have provided such employees at least 45 days after receiving the Agreement and the Release to sufficiently review and consider them). Once the signed Agreement and Release are returned to [COMPANY REPRESENTATIVE], the employee has 7 days to revoke the Agreement and/or Release.
4. The following is a listing of the ages and job titles of employees in the _____

Department who were and were not selected for termination and the offer of consideration for signing an Agreement and Release:

The following is a list of the ages of individuals in the same job classification or organizational unit who are eligible or selected for the program:

Job Title	Age
Bank Teller Main Street	54
Bank Teller Main Street	36
Bank Teller Main Street	27
Loan Officer Main Street	45
Loan Officer Main Street	62

The following is a list of the ages of individuals in the same job classification or organizational unit who are not eligible or selected for the program:

Job classification or organizational unit	Age
Bank Teller Broad Street	25
Bank Teller Broad Street	37
Bank Teller Broad Street	47
Loan Officer Broad Street	37
Loan Officer Broad Street	45

NOTE: Some employers include criteria for selection for the program, which may include seniority, job performance, ability to perform the tasks of those not laid off, suitability for the jobs remaining after the reduction in force, and position elimination.

CONCLUSION • It should be noted that the general rule is that a release is valid if it is “knowing, voluntary and for a valuable consideration.” OWBPA has specific rules as to what constitutes a “knowing and voluntary” release, which are reflected in certain of the above language. Again, this additional language is only required for terminees who are 40 years of age or older. This includes: (a) reference to ADEA and Older Workers Benefit Protection Act (“OWBPA”) in Section 12 above; (b) Section 20 above; (c) Section 21 above; and (d) Section 22 above. Even if part of a reduction in force, employees under the age of 40 need not be provided with a specific period of time to review a release agreement (although a reasonable period of time, such as 14 days is generally recommended), and they need not be provided with a period of time within which to revoke the agreement.

Additionally, the provisions included in Sections 21 and 24 above need not be included in a release agreement when the termination is an individual termination (i.e., not part of a group termination). The ADEA does, however, require that all individual terminees who are age 40 or over be provided with 21 days to review the release agreement and seven days to revoke same (therefore, section 20 above will need to be re-worded to reflect (a) this different review period and (b) that an OWBPA exhibit will not be attached to the release agreement).

Finally, and as noted above, several federal, state and local governmental agencies and regulatory authorities have been scrutinizing employers’ separation and release agreements, and have recommended that certain provisions be removed or added. Best practice is to review separation agreements on a regular basis, so as to ensure compliance with these rules and recommendations.