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When an employee is terminated: tips for achieving a successful full and final release

A termination package should be strategically structured and include a comprehensive release.

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A release found to be signed under duress could result in it being unenforceable. PHOTO: FOTOLIA

A comprehensive settlement document, including a release and indemnity, provides an employer the comfort of knowing issues relating to the departure of an employee are fully and finally resolved. However, even a well-drafted settlement document won't be worth the paper it's written on if the employer does not comply with basic legal principles concerning releases.

Consider this recent case. When an Ontario pipe manufacturer terminated employee AB (not her initials), it offered a termination package equivalent to 12 months' salary and pay in lieu of benefits,

pension and bonus. In exchange, it requested she sign a full and final release of all claims or potential claims against the company, including those under the Human Rights Code of Ontario.

Among other things, the release expressly stated the employee understood its contents and had the opportunity to seek legal advice.

AB was provided a week to review the termination offer and release, and to return the release signed. Not only did she not request an extension of this time, AB returned the signed release prior to the one-week deadline.

Almost a year later, AB filed an application to the Human Rights Tribunal of Ontario (HRTO) alleging the termination of her employment was motivated, at least in part, by her age and history of medical issues. She asserted the release was signed as a result of 'economic duress'; her children's tuition payments were due and she did not have the resources to consult a lawyer. She said she was a 'mess' as a result of the termination and believed if she did not sign the release, any payment she may ultimately receive would be delayed. She also argued she was not provided sufficient time to review the release before signing.

Request for dismissal

The company asked the HRTO to dismiss the application without a hearing on the merits, relying on the signed release, and that AB had signed and returned it prior to the requested date.

The HRTO acknowledged there are circumstances in which a release signed under duress – including economic duress – could result in it not being enforceable.

Economic duress is defined as "...an unlawful coercion to perform by threatening financial injury at a time when one cannot exercise free will". The test to establish economic duress is difficult to pass, and financial pressure alone will not be enough to set aside a release otherwise signed freely and voluntarily.

The HRTO concluded AB was not able to pass the test.

A release will not provide the security an employer is seeking if a departing employee can attack it later.

To ensure your organization receives the full and intended value, follow these guidelines:

Exceed minimum statutory requirements. When terminating without cause, ensure the payment exceeds the minimum requirement under applicable employment legislation. If an existing employment agreement specifies the amount of termination pay to which an employee is entitled, but does not already require a release in exchange for payment, ensure the payment exceeds the amount set out in the agreement. This extra amount is “consideration” for the release.

Time to review. Provide the departing employee at least three to five business days to review the settlement documentation and seek legal advice. Advise an employee who wants to sign the release during the termination meeting that you can’t accept it and to take the release away to review. If a reasonable extension is requested, provide it; an employer would be hard-pressed to justify not doing so.

Do not provide legal advice. Be careful not to comment on the employee’s legal rights under the release. If there are questions, encourage the employee to seek legal advice. You may even consider offering a reasonable amount to offset the cost of consulting a lawyer.

Do not withhold minimum entitlements. When terminating without cause, do not threaten to withhold minimum statutory entitlements (such as termination and/or severance pay) unless and until the employee signs the release. It’s unlawful to do so and may cause a court or tribunal to conclude the release was signed under economic duress.

A release can be an employer’s best friend, but only if it’s drafted and enforced properly, and in accordance with the law.

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