TCAA – 2017 Fall Conference
October 5, 2017 – Houston, Texas

Staying Out of the Courthouse: Best Practices for Employee Discipline

Authored by:
Autum Flores
Caitlyn Lindsey
Slater Elza

Presented by:
Slater C. Elza
UNDERWOOD LAW FIRM
P.O. Box 9158, Amarillo, Texas 79105
(806) 379-0347

Biographies

SLATER C. ELZA

Slater Elza's practice focuses on representing governmental entities, including municipalities, economic development corporations, independent school districts, and hospital districts. Slater serves as general counsel to many municipalities in West Texas and the Texas Panhandle. He also maintains a civil litigation practice, representing businesses and employers throughout the Texas Panhandle and South Plains. As a litigator, Slater has tried over 125 matters through verdict in state court, federal court and arbitrations.

Slater serves as Executive Secretary for the Texas Association of Defense Counsel, a statewide organization of personal injury defense, civil trial and commercial litigation attorneys, and is a former treasurer and current director for the Amarillo Area Bar Association. He is a board member for the Texas City Attorneys Association and is a former regional chairmen for the Texas Supreme Court's Committee on the Unauthorized Practice of Law.

AUTUM FLORES

Autum Flores specializes in labor and employment law and practices with the Underwood Law Firm, P.C. Ms. Flores frequently consults with employers in relation to a wide range of labor and employment-related questions and issues, including union organization and bargaining, unfair labor practices, wage and hour issues, discrimination and harassment, medical and other personal leave, terminations and layoffs, employee training, unfair competition and trade secrets, whistleblowing and retaliation, workplace safety, privacy and data security, and employee handbooks and policies. Ms. Flores also has substantial experience in civil litigation with a particular emphasis on labor and employment, commercial litigation, regulatory, antitrust, and securities matters. Ms. Flores has represented clients before state and federal courts and at both the trial and appellate levels. She is a member of the State Bar of Colorado and the State Bar of Texas. She is also admitted to practice in the U.S. District Court for the District of Colorado, the U.S. District Court for the Northern District of Texas, and the Fifth Circuit Court of Appeals. Ms. Flores received her law degree in 2007 from Harvard Law School and also holds a B.B.A. degree from the University of Texas at Austin, where she majored in International Business with a minor in Spanish.

CAITLYN LINDSEY

Caitlyn Lindsey's practice is focused primarily on public education law and employment litigation. She is a native of DeKalb, Texas and graduated from DeKalb High School in 2010. She attended Texas A&M University in College Station where she received a Bachelor of Business Administration in Business Management in 2014. Caitlyn attended Baylor Law School and graduated with a Doctor of Jurisprudence in April 2017, and is currently awaiting Bar results. In her spare time, Caitlyn loves a good Netflix binge, spending time with her husband, and enjoys traveling to Northeast Texas to see her family.

Table of Contents

Staying Out of the Courthouse: Best Practices for Employee Discipline

I. Putting A Discipline Policy In Place Proactively

Having a clear disciplinary policy is essential for municipalities for a number of reasons. It helps employees understand what behaviors are not acceptable in the workplace, and if enforced consistently, it serves as a significant deterrent to unwanted or unlawful behaviors by employees. The end result is, hopefully, a productive workplace with fewer disruptions and higher employee morale. Further, having a clear, consistent discipline policy can help an employer avoid legal claims by employees or former employees.

For example, an employee might bring a claim against their employer in which the employee asserts that a certain disciplinary action was taken against the employee on the basis of discrimination or retaliation. The employer might counteract that claim by introducing evidence that the same type of discipline has been consistently given to all employees who have violated similar policies, including employees who do not share the same protected characteristics as the employee who brought the claim. As another example, an employer might wish to dispute a former employee's entitlement to unemployment insurance benefits. If the employer has a clear disciplinary policy in place and can show that the terminated employee violated the consistently applied policy, it is more likely to prevail in fighting the employee's rights to unemployment compensation based on the employee's misconduct.

A good disciplinary policy should include a written code of conduct or a list of unacceptable behavior. Employees should be asked to sign an acknowledgement that they have received and reviewed a copy of the policy. The purpose of distributing this information in writing to employees is to provide clear instructions for the employer's expectations in the workplace and to give employees a reference to which they can look back. The language in an

employer's code of conduct should be specific enough to notify employees of what types of conduct are unacceptable in the workplace, but it should also be broad enough to cover all unacceptable conduct that might arise, even if the conduct is not specifically described in the policy.

The employer might also consider outlining its actual disciplinary stages or policies in the handbook, though it should be careful not to box itself in on potential disciplinary options for certain conduct. For example, an employer may want to follow a progressive discipline approach, which can have many benefits in the workplace. But putting such a policy in writing might hamstring the employer's ability to apply more severe discipline when it believes more severe discipline is warranted. Therefore, the employer should always clearly reserve the right to apply any discipline, including termination, for any conduct. Even with this disclaimer though, the employer must be sure that it intends to consistently follow its progressive discipline policy when possible, because failure to follow it in certain instances may lead to claims of discrimination or retaliation. Because of these potential pitfalls, smaller employers who can more easily track and consistently apply employee discipline might benefit from not including a progressive discipline policy in their written handbooks.

Finally, if employment is at-will, the policy should emphasize that, and it should avoid any language that might imply employees will continue to have a job as long as they behave in certain ways.

II. What To Do When There Is No Policy Addressing An Offense

As indicated above, an employer's disciplinary policy should be general enough to allow the employer to discipline an employee for any and all unacceptable conduct. But what happens if the employer's policy is not broad enough to cover certain conduct that the employer believes

merits discipline? Fortunately for most[1] employers, the absence of specific language in a disciplinary policy does not necessarily impair the employer's ability to discipline appropriately, as long as the employer follows certain guidelines.

If the offense is minor, and it is not addressed or prohibited in the employer's policies or handbook, the employee may not know that he or she is doing anything wrong. In such circumstances, the employer should first speak with the employee about the conduct and should consider revising the employer's policies to address the conduct. If the employee does not correct their behavior after the conversation with the employer and after an opportunity to cure their behavior, the employer may want to move to formal discipline.

If the conduct is more severe, the employer may want to start by formally disciplining the employee rather than simply speaking with the employee. If an at-will employment relationship is clear, an employer may terminate an employee for any reason, as long as that reason is not otherwise prohibited by law. This is true regardless of whether the employer's disciplinary policy addresses the conduct at issue. However, the employer must be aware of the risks involved in terminating an employee for conduct not addressed in its handbook – if the employee makes a claim for unlawful discharge (discrimination, retaliation, or the like), the employer cannot point to a violation of its disciplinary policies as evidence of lawful termination.

An employer may also impose less severe discipline for conduct not addressed in the employer's policy, but it must be careful that such discipline is consistently enforced. If the employee is the first to engage in a certain type of unacceptable conduct, the employer might consider revising its policies to address that conduct (or it might consider broadening the language in its policy so that it will cover all unacceptable conduct). The employer should

[1] Employment relationships that are governed by an employment agreement must be examined under the specific terms of the employment agreement. In some cases, an employment agreement might address the types of conduct that can merit discipline in the employment relationship.

ensure that any employee who subsequently engages in the same unacceptable behavior receives similar discipline. If the employee is not the first employee to engage in a certain type of unacceptable conduct, the employer should determine whether, and how, it disciplined other employees who previously committed the same acts.

The keys to an employer protecting itself from liability in these situations are consistency and documentation. All employees must be disciplined consistently for similar unacceptable behavior, and the employer should carefully document the reasons for discipline and/or termination. With good documentation, the employer can show that the reasons for discipline or termination are legitimate reasons and are not pretext for an unlawful action taken against the employee.

III. Evaluating Employee Performance While Mitigating Liability

Employee performance reviews can be uncomfortable, often even more so than issuing discipline to an employee. With disciplinary actions, employers are often dealing with employees who intentionally break the rules. With negative performance reviews, however, employers are often dealing with employees who simply are not competent to satisfactorily perform their jobs, despite their dedication and hard work. Telling a well-meaning employee that they are doing a bad job is simply a hard thing to do.

The first step an employer can take to protect itself is to hire employees for a probationary period with a performance review to take place at the end of the probationary period. Assuming the employee is at-will, the employer must make it clear that the probationary period does not guarantee any length of employment – the employee may still be terminated for any reason either before or after the probationary period ends. The purpose of the probationary period is to give the employee time to learn the job and to make sure that the employee is

capable of performing the job duties. The length of the probationary period should be determined in accordance with the difficulty of the job duties to be learned. If a probationary period is done correctly, and an honest assessment is taken at the end of the period, the employer can avoid future complications by either cutting an employee loose at the end of the period (without worrying about the need for documentation of prior instances of misconduct or negative performance), or continuing the individual's employment with the expectation that the employee can and will satisfactorily perform all job duties in the future.

If an employer continues to conduct performance reviews for all employees, the performance reviews must be done honestly, consistently, and thoroughly to be effective. In fact, if performance reviews do *not* meet these criteria, the employer is much worse off from a legal liability standpoint. For example, a common problem with performance reviews is that supervisors are hesitant to offer honest, negative feedback to their employees. They understandably want to avoid confrontation and awkward conversations. So, supervisors tend to complete performance reviews in a much more positive light than an employee's performance truly merits. Eventually, the employee's performance might decline to such a point that the employer wants to terminate the employee, and it does so. If that employee brings a claim for unlawful discharge, the employee's positive performance reviews will tend to support the employee's unlawful discharge claims against the employer. So, if an employer cannot ensure that performance reviews are honest, consistent, and comprehensive, it would be better off by not having performance reviews at all.

A good performance review is one that lists each of the job expectations for the employee and offers constructive feedback for each of those expectations. Employees should be given clear directions on what they need to do to improve on any points of poor or weakening

performance, and they should be given a timeline for expected improvement with a description of potential consequences if they do not meet expectations within that timeframe. Employers should have the employee sign the performance review, and the employer should document its conversation with the employee about the performance review. Finally, employers should be wary of guaranteeing or implying that employees will receive any benefits, raises, or continuing employment associated with positive performance reviews unless the employer fully intends to honor such commitments.

IV. What Goes In The Discipline/Discharge Letter?

Employers should keep a written record of all discipline given to employees. A disciplinary notice or letter should include the following: (1) the type of discipline being given, including a list of prior discipline given for the same or similar offenses; (2) a detailed description of the unacceptable conduct, including the date(s) on which it occurred and how the conduct is negatively affecting the workplace; (3) a description of the employer's policy that is being violated by the conduct; (4) a description of the improvement required for the employee; (5) a deadline by which the employee is expected to improve; and (6) the potential consequences if the employee does not improve within that timeframe. The employee should be asked to sign a copy of the disciplinary notice to acknowledge that he or she has received it. If the employee refuses to sign it, a representative of the employer should sign it and note that the employee received the notice but refused to sign. A copy of a disciplinary notice is attached.

Employers should avoid any language in a disciplinary notice that infers bias or discriminatory motives, including any language that presumes the cause of the employee's conduct. Instead, the disciplinary notice should focus solely on the conduct itself. For example, the employer should not state in the disciplinary notice that the employer is worried that the

employee's declining health or childcare issues may be contributing to the employee's inability to fully perform their job. Likewise, even noting concern about an employee's "lack of commitment," when the employee is faced with medical issues or childcare issues, may later be used against the employer in a discrimination or retaliation claim. The employer instead should choose language that focuses on specific, definable conduct, such as the employee's consistent tardiness, excessive absences, or refusal/failure to perform requested work assignments, with a list of specific instances.

When issuing disciplinary notices, employers should be sure that they have conducted an appropriate investigation into the facts upon which the discipline is based. The employer should talk to witnesses about the alleged conduct, and it should examine any documents that might be relevant to the discipline. The employer should also speak with the employee to get the employee's perspective. If an employee wishes to rebut the allegations in a disciplinary notice, the employer should encourage the employee to submit a document with the employee's rebuttal, and then the employer should attach that document to the disciplinary notice itself to keep in the employee's personnel file.

A discharge or termination letter should confirm the employee's termination and the effective termination date, and it should summarize any information the employee needs to know, such as whether the employee will receive any severance pay, when and how the employee can obtain their last paycheck, a description of benefits to which the employee is entitled, and a reminder of the employee's obligations to return company property and/or to comply with a confidentiality or non-compete agreement, if applicable.

A question that often arises is whether an employer should state the reason for termination in the letter. On the one hand, including a well-drafted reason for termination in the

letter can help an employer fight any claim for unlawful discharge and can assist with disputing a claim for unemployment benefits. A well-drafted reason for termination is one that details the facts leading up to the termination and includes a reference to any of the company's policies that have been violated by the employee. Without knowing the real reason for their termination, an employee might otherwise speculate as to unlawful reasons that they might have been terminated. On the other hand, including a specific reason for termination in the discharge letter might box in an employer, such that if the employee brings a claim for unlawful discharge, the employer will be required to prove that the employee was terminated for that exact reason.

Overall, if the reasons for termination are well-documented and supportable by evidence, it is usually more beneficial to include the reason for termination in the discharge letter. If an employer is hesitant about doing so, or if the employer is not sure what language to include in the letter, it should contact its attorney for advice.

V. At What Point Should Discharge Be Considered?

A number of factors play into whether a particular employee should be terminated from employment. As an initial matter, the employer must determine whether the employment relationship is at-will or contractual. If an employment agreement is in place, termination of the employee should comply with the terms of that agreement or the employer will risk being subjected to a breach of contract claim. Employers should also be wary of any documents that might unintentionally abrogate an employee's at-will relationship, such as employee handbooks. All documents given to employees that might be construed as contractual in nature (including employee handbooks) should contain a clear disclaimer that employment remains at-will.

If employment is at-will, the employer should consider several things before terminating an employee. First, does the employer have a lawful reason for termination? Employers cannot

terminate their employees for any reason prohibited by law, which includes termination based on a protected characteristic (for example, gender, race, ethnicity, marital status, disability, age, pregnancy, or religion) or termination in retaliation for an employee's exercise of certain legal rights (for example, FMLA/FLSA retaliation, worker's compensation retaliation, whistleblower retaliation, or labor rights retaliation). If an employer is unsure if the reason for termination is lawful, the employer should consult an employment attorney before terminating the employee.

Second, the employer should consider whether termination is the best option. Many employers expend significant resources in recruiting and training their employees, so terminating an employee is a lost investment to the employer. Often, disciplining the employee and giving them an opportunity to cure their behavior will be more economical for the employer (and it will be more beneficial for employee morale if employees know that they will be given an opportunity to improve before being terminated from employment).

Third, if the employee has been given opportunities to improve and has failed to do so, or if the employee's conduct is so egregious or severe as to merit termination without an opportunity to improve, the employer should consider whether it has documentation or other evidence of the employee's unacceptable conduct that will support termination. If the employee has received only positive performance reviews in the past and has no prior records of disciplinary issues, the employer should carefully weigh the elevated risks in terminating that employee. To minimize the risk, the employer should be sure that it is following its own policies as closely as possible and is treating all employees consistently.

VI. Minimizing Liability When Discharging An Employee

Meeting with an employee to notify them of their termination can be fraught with potential legal pitfalls. To reduce risks of legal liability, employers should follow certain guidelines when discharging an employee.

First, employers should maintain confidentiality of sensitive information to the extent possible. Prior to terminating the employee, employers should only discuss their plan to terminate, and the reasons for their plan to terminate, with those who need to know. During and after the termination meeting, employers should avoid discussing the reasons for the termination with other employees, though other employees can be told that the employee has been separated from employment.

Second, prior the termination meeting, the employer should consider all legal requirements with which it must comply, such as when the employee can expect to receive their final paycheck, and to what extent the employee is entitled to any continuing benefits following termination, including COBRA benefits. The employer should expect questions from the employee about these issues during the termination meeting, and it should be prepared to answer those questions during the meeting. The employer should also have the termination letter ready to hand to the employee during the meeting, which will address many of the employee's questions.

The termination meeting itself should take place in a private location, and if the employer has any anticipation at all that the employee may become disruptive or a danger to the workplace, the employer should plan to take the appropriate precautions before the meeting begins by having a security guard present or available if the need arises. The employer should arrange for any necessary parties to be present during the termination – necessary parties might

include the employee's supervisor who can explain the reasons for the employee's termination and/or a human resources representative who can discuss administrative issues such as final paychecks, continuation of benefits, and return of company property.

During the meeting, the employee should be clearly told that they are being terminated. If the employer is comfortable that the reasons for termination are well-supported, the employer should also explain why the employee is being terminated so that the employee is not left to speculate about the reasons. The employer should ask the employee to return their keys or access card immediately, and as a best practice, the employee should be escorted to their desk to gather their things (or arrange a time later when the employee can return to gather their things) and then escorted out of the building. If possible, the meeting should be scheduled for the end of the day or at a time when the workplace is less busy to reduce the potential for making a scene or publicly shaming the employee.

VII. Common Mistakes To Avoid During Discharge

Discharging an employee is never easy, and the circumstances surrounding an employee discharge are never the same. For this reason, employers commonly encounter mishaps in the termination process that can increase their risks of liability. The following are some of the most common mistakes made by employers when terminating employees.

- **Lack of Preparation**: Before terminating an employee, the employer should (1) review all of the relevant documentation, including any contracts with the employee and prior disciplinary notices; (2) prepare a termination letter; (3) arrange to have all necessary parties at the termination meeting; and (4) consider all administrative components of the termination, including timing of final paycheck and entitlement to any continued benefits or paid PTO.

- **Failing to Define the Reason for Termination**: The employer must be prepared to discuss the precise reason for the employee's termination, and it should ensure that this reason is well-supported by documentation, witnesses, or other evidence. The employer should also ensure that the reason for termination is lawful. In advance of the meeting, the employer should script out the reason for termination and share it with any other individuals who will be involved in the meeting.
- **Engaging in Argument with the Employee**: The employer should inform the employee that the termination is not up for discussion and that the employer will not address any questions by the employee about the reason for termination. The employer should not apologize for the termination or provide any additional detail except for its scripted reason for termination. Debating with the employee during the termination meeting is risky for an employer because it may lead the employer to give inconsistent explanations for the termination, or it may offer the employee hope that the employee can stay employed.
- **Sharing Sensitive Information with Other Employees**: Employers should tell other employees only what they need to know, which is usually just that the employee has left, along with any information necessary to transition the work of the employee. Sharing any additional information may subject the employer to a risk of a defamation suit by the departing employee. Likewise, the employer should refrain from providing negative information about the employee to potential employers who call for a reference.

VIII. Waivers And Releases – Their Use In a Termination

When terminating or laying off employees, employers should always take steps to protect themselves from liability, and such steps can include the use of a waiver and release agreement.[2] Waiver and release agreements can be the most economical way for an employer to terminate a problematic employee while protecting itself from liability.

When making the decision to present a waiver and release agreement, the employer should carefully consider the level of risk associated with the termination of the employee. Is the employee in a protected category? Has the employee recently engaged in any protected activity, such as taking FMLA leave or filing a claim for worker's compensation? Is there an employment agreement under which the employee might bring a claim for breach of contract? If the answer to any of these questions is "yes," the employer should carefully consider whether a waiver and release agreement, in exchange for some compensation or consideration from the employer, would be beneficial.

Waiver and release agreements must be carefully drafted to comply with the law, and certain legal claims cannot be waived by employees. Further, employers must tread carefully when presenting waiver and release agreements to employees who may have a valid legal claim against the employer. The employer should be careful not to say or do anything when presenting the agreement that might be construed as additional evidence supporting the employee's potential claim. Therefore, if an employer believes that a waiver and release agreement would be beneficial, it should contact an attorney for assistance in ensuring that the agreement is enforceable and is presented to the employee in the most legally-advisable manner.

[2] A "release" or "waiver" is an agreement by one party to surrender its own cause of action against the other party. *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993). A release or waiver of claims is typically one section in a larger severance agreement.

A. Federal Law Claims

i. Fair Labor Standards Act Claims

The Fair Labor Standards Act ("FLSA") establishes and enforces minimum wage and overtime pay, among other things, for public and private employees. Generally, a claim under the FLSA cannot be waived. *Bodle v. TXL Mrtg. Corp.*, 788 F.3d 159 (5th Cir. 2015); *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706 (1945). However, there is an exception if the FLSA claim is released pursuant to a bona fide dispute over hours worked or compensation owed. *Bodle*, 788 F.3d at 165. For example, in *Lopez*, Lopez's employer terminated him. *Lopez v. Southern Arch, LLC*, 2016 WL 3617671, at *1 (E.D. La. 2016). Upon termination, Lopez signed a severance agreement that released all "claims related to his work" in exchange for $500. *Id*. After signing the agreement, Lopez brought suit against his former employer under the FLSA for unpaid overtime wages. *Id*. The court stated that in the Fifth Circuit, the general rule is that an FLSA claim cannot be waived. *Id*. at *4. However, there is one exception—when there is a bona fide, legitimate dispute between the employer and employee about minimum wages, overtime pay, etc., then the parties may enter into an agreement to waive FLSA claims. *Id*. The purpose of the exception is to allow an employer and employee to settle their dispute if there has been some sort of internal investigation into the number of hours in dispute, or the amount of pay allegedly due. *See id*. In other words, FLSA claims may be released or waived in a severance agreement when there is a legitimate dispute between an employer and employee about wages or overtime, the parties engage in "factual development," and both parties understand the basis of the dispute. *See id*. The employer in *Lopez* admitted that it offered all workers who leave the company the same severance agreement to "shield" itself from liability and that no dispute existed between it and Lopez when Lopez signed the release. *Id*. at *5. Because Lopez signed

the agreement before a legitimate dispute about wages or overtime existed, the release was not valid and Lopez was allowed to bring his FLSA claims. *Id*.

ii. False Claims Act Claims

The federal False Claims Act allows a private person to file a lawsuit against individuals, businesses, and other entities that have defrauded the federal government. The "whistleblower" nature of this Act is the key to its success and is a valuable asset to the federal government in combatting fraud against the government. As the target of the Act, employers have included claims under the Act in separation agreements. In *Longhi*, Longhi brought suit under the False Claims Act against his employer for the employer's attempt to defraud the government. *Longhi v. Lithium Power Technologies, Inc.*, 481 F.Supp.2d 815, 817 (S.D. Tex. 2007). Almost two weeks later, Longhi signed a general release agreeing not to sue his employer. *Id*. The employer argued it could not be sued under the False Claims Act because Longhi signed a release. *Id*. at 816. The court held that public policy prevented the release from being valid. *See id*. at 820. The key factor in determining whether a False Claims Act claim has been released is determining whether the government has had the opportunity to fully investigate the alleged fraud. *See id*. at 819–820. To enforce a release of False Claims Act claims, an employer must show the government fully investigated the matter or had full knowledge of the alleged fraud before the release was executed. *Id*. at 821. In Longhi's case, the government had not fully investigated the matter, so the release could not be enforced.

Unfortunately, there seems to be little an employer can do to ensure a False Claims Act claim is released in a severance agreement. The key factor in determining whether the claim is released is whether the government has fully investigated the employer's alleged fraud. The status of a government investigation into an employer is not information that is readily available

to that employer. Regardless, the only situation in which the claim would be released is if the government was already in a position to bring suit against the employer itself. A waiver of an employee's right to bring a claim on behalf of the government would do little to help the employer in this situation. As a result, a waiver of False Claims Act claims in a severance agreement is not likely to be helpful to an employer.

iii. EEOC Claims

1. Title VII Claims & Americans With Disabilities Act Claims

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees based on sex, color, race, national origin, and religion. Public and private employees with fifteen or more employees are subject to the Title VII. Generally, Title VII claims can be waived in a severance agreement. *Smith v. Amedisys Inc.*, 298 F.3d 434 (5th Cir. 2002). In fact, public policy favors voluntary settlement agreements. *Id*. The Americans with Disabilities Act ("ADA") prohibits employment discrimination based on disability. *Rivera-Flores v. Bristol-Myers Squibb Caribbean*, 112 F.3d 9, 12 (1st Cir. 1997). Certain disabilities may raise a question regarding whether the release or waiver was knowing and voluntary. *Id*. However, the mere fact the employee was disabled does not automatically make the release or waiver invalid. *Id*. The most important factor in determining whether a release or waiver of these claims is valid is whether the execution of the severance agreement was knowing and voluntary, which is discussed below.

2. Age Discrimination in Employment Act Claims

The Age Discrimination in Employment Act ("ADEA") prohibits discrimination against employees forty years or older based on their age. In 1990, Congress amended the ADEA by passing the Older Workers Benefit Protection Act ("OWBPA"). The OWBPA states that an

employee cannot waive ADEA claims unless the waiver is knowing and voluntary. To be "knowing and voluntary" the waiver must meet certain requirements:

- be part of an agreement between the employee and employer that is easy to understand;
- specifically refer to the ADEA;
- the waiver may not attempt to waive rights or claims that arise after the agreement is signed;
- the employee waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;
- the employee is advised in writing to consult with an attorney before executing the agreement;
- the employee is given at least 21 days to consider the agreement, or if the waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employee is given at least 45 days to consider the agreement;
- the agreement states that the employee has at least 7 days after signing the agreement to revoke the agreement;
- if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer informs the employee in writing and in plain language, as to:
    - any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

- 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). The statutory requirements are strictly enforced, and an ADEA claim cannot be waived unless the abovementioned requirements are met. *See Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 427 (1998).

iv. Family Medical Leave Act Claims

The Family Medical Leave Act ("FMLA") requires employers with fifty or more employees to provide twelve weeks of unpaid leave to eligible employees for the birth, adoption, or placement into foster care of a child, the serious health condition of a child, spouse, or parent, or the employer's own serious health condition. The FMLA states that employees cannot waive their rights under the FMLA. In *Faris*, Faris signed a release of all claims in exchange for an additional sum of money upon her departure. *Faris v. Williams WPC-1, Inc.*, 332 F.3d 316, 318 (5th Cir. 2003). Subsequently, Faris sued her employer under the FMLA alleging her termination was retaliation for asserting her FMLA rights. *Id*. The Fifth Circuit Court of Appeals determined that the prohibition on waivers of FMLA rights only applies to current employees and their substantive rights under the statute, such as rights to leave, reinstatement, etc., rather than to a cause of action for retaliation for the exercise of those rights. *Id*. at 320. Thus, Faris' claim was barred. *Id*. at 320. At least one other federal court of appeals has taken the opposite position and taken a pro-employee approach.[3]

Under current Fifth Circuit law, an employer can include a waiver of the right to file a retaliation claim under the FMLA in a severance agreement. However, the waiver must still be knowing and voluntary.

[3] *See Taylor v. Progress Energy, Inc.*, 415 F.3d 364 (4th Cir. 2005).

B. State Law Claims

Except for an employer's waiver under specified statutes, an individual's agreement to waive or release the individual's right to benefits or any other rights under the Texas Unemployment Compensation Act is not valid. TEX. LABOR CODE § 207.071; *Mitchell Energy & Dev. Corp. v. Fain*, 172 F. Supp. 2d 880, 887–88 (S.D. Tex. 2001) (recognizing the prohibition on waivers of unemployment claims under the Texas Unemployment Compensation Act). An employer's attempt to obtain or enforce a waiver of a right to recover unemployment benefits is punishable by fine and/or imprisonment. *Id*. § 207.074.

C. Future Claims & Unknown Claims

A waiver or release may not include future claims or rights. However, an employee may waive or release existing claims and future claims arising from conduct that has already occurred. *Kalyanaram v. Burck*, 225 S.W.3d 291 (Tex. App.—El Paso 2006, no pet.). The unknown claims must still be "mentioned" in the severance agreement, but the claim need not be identified. *Id*. at 297. To determine whether a claim is "mentioned" in an agreement, the court will look to the severance agreement as a whole. *See id*. at 299. In *Kalyanaram*, Kalyanaram signed a severance agreement which purported to waive all claims arising out of the employment relationship. *Id*. The court held Kalyanaram waived his right to sue his former employer for malicious prosecution, even though the malicious prosecution claim arose after the agreement. *Id*. The prosecution arose from events that occurred during the employment relationship, and thus was sufficiently "mentioned" in the severance agreement to be waived. *See id*.

It is important to remember that unknown claims can only be waived in a severance agreement if they are otherwise waivable. For example, an unknown FLSA claim cannot be waived. However, an unknown Title VII claim can be waived. To waive an unknown claim, it

must be "mentioned" in the severance agreement. To "mention" a claim that cannot yet be identified, an employer should instead describe the subject matter, or root, of any future dispute between itself and the employee—the employment relationship. Clearly stating that all claims arising out of the employment relationship and events that occurred therein are released and waived pursuant to the severance agreement will be sufficient to cover all otherwise waivable claims an employee may have against an employer.

D. Crafting An Enforceable Waiver

i. Adequate Consideration

An enforceable waiver or release must be supported by adequate consideration. Adequate consideration is anything of value the employee is not already entitled to when he is terminated. According to the *Smith* court, adequate consideration existed because Smith received severance pay and a promise of favorable references in the future. *Smith*, 298 F.3d at 444. The additional money and good references were adequate because they were things Smith was not already entitled to upon her departure. *Id*.

ii. Knowing and Voluntary

A release must be knowing and voluntary to be valid. *Id*. The *Smith* case lays out the framework for determining whether a release of Title VII claims is valid. First, the employer must show the employee signed a release that addresses the claims at issue and received adequate consideration. *Id*. at 441. If the employer can make such a showing, the employee's claims will be barred by the agreement unless the employee can show the release is invalid because of fraud, duress, material mistake, or the release was not knowing and voluntary. *See id*. To determine if the employee has met his burden to show the release is invalid, the court will consider:

- the employee's education and business experience;
- the amount of time the employee had to look over the agreement before signing it;
- the level of participation the employee had in deciding the terms of the agreement;
- the clarity of the agreement;
- whether the employee was represented by counsel;
- whether the consideration received under the agreement exceeds employee benefits to which the employee was already entitled by contract law. *Id.*

In *Smith*, Smith signed a release when she resigned that waived "any and all employment related claims" against her employer. *Id*. at 438. Later, Smith sued her employer under Title VII. *Id*. at 439. It was undisputed that Smith signed the agreement. *Id*. The only question was whether the waiver of her Title VII claims was knowing and voluntary. *Id*. at 443. Ultimately, the release was held to be valid because Smith was a high school graduate who had taken some college business classes, she read every word of the separation agreement before signing it, she could not articulate why she did not understand the agreement, and her job with the employer had included negotiating contracts. *Id*. at 443–44. Further, the agreement was a one-page document that used "plain and simple language," and she had time to consult an attorney if she wished. *Id*. Finally, Smith received consideration she was not already entitled to under contract. *Id*. Thus, Smith's release of Title VII claims against her employer were valid because it was a knowing and voluntary release. *See id.*

iii. Fraud, Duress, and Mutual Mistake

A waiver or release is not knowing and voluntary if it is the result of fraud, duress, or mutual mistake.

1. **Fraud.** Fraud exists when there is a (1) material misrepresentation, (2) made with knowledge of its falsity or without any knowledge of the truth and as a positive assertion, (3) made with the intention that the other party act on it, and (4) the other party relies on the misrepresentation and is injured. *McLernon v. Dynegy, Inc.*, 347 S.W.3d 315, 328 (Tex. App.—Houston [14th Dist.] 2011, no pet.). In *McLernon*, Dynegy terminated McLernon. *Id*. at 320. McLernon signed a severance agreement and agreed to waive certain claims in exchange for a large sum of money. *Id*. McLernon was told by a Dynegy employee that he was required to pay back his stock-purchase loans. *Id*. However, this was untrue because the loans had already been forgiven. *Id*. at 321. Dynegy later sued McLernon to collect on the loans under the severance agreement, and McLernon claimed the severance agreement was invalid due to fraud. *Id*. The court held that McLernon had waived his right to claim fraud in the severance agreement because the agreement included a disclaimer of reliance. *Id*. The disclaimer stated that McLernon did not rely on any representations or statements made by Dynegy or its employees when executing the severance agreement. *Id*. at 329.

2. **Duress.** A severance agreement executed under duress is unenforceable. "[T]he mere fact that a person enters into a contract as a result of the pressure of business circumstances, financial embarrassment, or economic necessity is not sufficient" to show duress. *Chouinard v. Chouinard*, 568 F.2d 430, 434 (5th Cir. 1978). For example, proof the employer unfairly created and took advantage of the employee's "untenable" situation would

show duress. *Id*. at 435. However, mere pressure from business circumstances, such as being offered a large amount of money to waive claims, will not rise to the level of duress.

3. **Mutual Mistake.** An agreement may be avoided if the parties were under a misconception or mistake of material fact. *Barker v. Roelke*, 105 S.W.3d 75, 85 (Tex. App.—Eastland 2003, no pet.). However, once a party ratifies the agreement by recognizing the agreement, performing under it, or affirmatively acknowledging it, the party can no longer avoid the contract. *Id*.

E. Conclusion

Severance agreements provide benefits to the employer and employee, while also giving an employer peace of mind. When offering and negotiating a severance agreement, here are a few things to remember:

- Draft the agreement using plain and easy-to-understand language and include a disclaimer of reliance.
- Suggest the employee look over the agreement with an attorney, and read over the agreement with the employee yourself.
- After going over the agreement with the employee, give the employee time and space to consider the agreement.
- Engage in negotiations with the employee if the employee initiates such discussions.
- Offer consideration above and beyond what you are already required to give the employee upon termination.