

The Three R's of Post-Employment

Releases, Restrictive Covenants, and Reference Requests

Pittsburgh Employment Law Conference

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RELEASES – DEFINITION

What is a Release?

- A written agreement between an employer and an employee
- Entered into at or about the time of the employee's termination
- The Employee agrees to waive all actual or potential legal claims against the employer relating to the employee's employment

RELEASES – WHEN TO REQUEST

When Should an Employer Request a Release?

- Releases are recommended if the terminated employee has a valid or potentially valid legal claim against the employer and is likely to accept the consideration that the employer is prepared to offer
- Releases should be requested as a condition of receiving severance under an employer severance pay policy, provided that the policy is drafted to include this requirement
- Releases are neither necessary nor desirable in many situations of employment termination
 - Unlikely that the employee has a valid legal claim against the employer
 - Unlikely that the employee will pursue a valid claim against the employer
 - Employee is unaware that he has a potentially valid claim against the employer
 - Employee is unlikely to accept the amount of consideration that the employer is willing to offer in exchange for the release

RELEASES – HOW TO REQUEST

How Should an Employer Request a Release?

- The employer or its counsel should carefully draft the release to contain all necessary provisions and to comply with all applicable legal requirements
- The employer should present the release at or near the time that the employee is notified of his termination
- If the employee is represented by a labor union, the employer should solicit the union's participation in the negotiation of the release

RELEASES – HOW TO REQUEST (CONTINUED)

How Should an Employer Request a Release? (continued)

- The employer should explain generally the nature of the release, the nature of the consideration that is being offered, and the fact that the employer is requesting that the employee release all claims relating to his employment
 - Meeting should be done in a non-coercive setting
 - Preferably by a human resources person other than the immediate supervisor of the terminated employee
 - A third person should always be present to witness the conversation
 - An employee should never be permitted to sign the release in the meeting

RELEASES – HOW TO REQUEST (CONTINUED)

How Should an Employer Request a Release? (continued)

- The employer should advise the employee in writing that he should consult with an attorney prior to signing the release
- The release must be knowing and voluntary
- If the employee asks questions the answer to which are not readily apparent, the employer should advise the employee that it will respond to those questions subsequently in writing
- The employer should allow the employee at least several days within which to review and consider the release
 - If the claims arising under the ADEA, the employer must allow additional time
- The employer should pay the consideration for the release after the employee has signed the release (e.g. severance package)

RELEASES – ADDITIONAL REQUIREMENTS

What are Additional Requirements of a Release Under the Older Worker's Benefit Protection Act?

- The Older Worker's Benefit Protection Act requires releases of age claims to
 - Be in writing, using plain language
 - Refer to the Age Discrimination in Employment Act by name
 - Not waive future claims
 - Provide for consideration beyond that to which the employee is already entitled
 - Advise the employee to consult with an attorney before signing
 - Provide 21 days to review/consider
 - Provide 7 days to revoke

RELEASES – ADDITIONAL REQUIREMENTS

What are Additional Requirements of a Release for Group Layoffs?

- Group layoffs (two or more employees) or exit incentive programs require releases to
 - Provide 45 days to review/consider
 - Provide additional information to the affected employees
 - Class, unit, or group covered by program
 - Eligibility factors considered
 - Time limits applicable
 - Job titles and ages of all people
 - Both those eligible or selected for the program AND in the same job classification or organizational unit not eligible or selected

RELEASES – FACT PATTERN

ABC Company decides to terminate Tom, a maintenance worker who is a member of a union, because he has been making lengthy personal calls on company phones during work hours to his girlfriend, Penelope, who lives in France. During his term of employment with ABC Company, Tom, who is black, was improperly denied leave under the Family Medical Leave Act due to a miscalculation by ABC Company of his eligibility at the time of the request. All other requests for leave under the Family Medical Leave Act during a similar time frame made by white employees were duly granted. Tom is unaware of ABC Company's miscalculation and believes that his leave was denied because of his race.

RELEASES – QUESTION 1

Of the choices below, which best describes why ABC Company should or should not request a release?

- A. ABC Company should request a release from Tom, because Tom has a potentially valid legal claim against ABC Company
- B. ABC Company should not request a release from Tom, because Tom has no potentially valid legal claim against ABC Company
- C. ABC Company should not request a release from Tom, because he is a member of a union and the release will likely alert Tom to the fact that he may have a potentially valid legal claim against ABC Company
- D. B and C
- E. None of the above

RELEASES – QUESTION 2

ABC Company determines that it would like to pursue a release from Tom. Of the choices below, which best describes how ABC Company should request a release?

- A. ABC Company should solicit participation by Tom's union in the negotiation of the release
- B. ABC Company should have Tom's supervisor, with whom Tom has an excellent relationship, present the release ten days after Tom's termination
- C. ABC Company should have two Human Resource representatives, who Tom does not like, present the release five days after Tom's termination
- D. A and C
- E. B and C

RESTRICTIVE COVENANTS – DEFINITION

What is a Restrictive Covenant (also called a “Covenant-not-to-Complete”)?

- A written agreement between an employer and an employee
- Ancillary to either an employment relationship or another lawful transaction
 - There must be consideration
- The employee agrees not to engage in certain competitive activities
 - Usually for a pre-determined period of time and in a pre-determined geographic area; both should be reasonably limited under Pennsylvania law
- The restrictive covenant should be reasonably necessary for the employer to protect its legitimate business interests

RESTRICTIVE COVENANTS – PREREQUISITES

What are the Prerequisites of an Enforceable Restrictive Covenant in Pennsylvania?

- The employer must pay adequate consideration
 - Beginning an employment relationship is usually sufficient consideration
 - Another lawful transaction including consideration
- The restrictive covenant imposed must be reasonably necessary for the protection of the employer
- The restrictive covenant imposed must be limited in time
- The restrictive covenant imposed must be reasonably limited in geographic scope

RESTRICTIVE COVENANTS – WHEN TO REQUEST

When Should an Employer Request a Restrictive Covenant?

- The employee occupies a critical position in the company
 - Access to confidential business information
 - Customer lists, trade secrets, specialized skills or training
 - Exposure to customers
 - Development of relationships
- Subsequent employment of the employee by a competitor would likely cause significant harm to the employer's business

RESTRICTIVE COVENANTS – FACT PATTERN

Jane, a highly skilled traveling sales associate is offered a position with Company XYZ, which distributes locally-brewed beer to restaurants and pubs. As part of the new position, Jane will travel through the seven Western Pennsylvania counties anchored by the city of Pittsburgh, selling Company XYZ beer. In order to effectively do her job, Jane will have full access to Company XYZ's pricing information, customer list, order histories, and brew process.

RESTRICTIVE COVENANTS – QUESTION 1

Of the choices below, which best describes why Company XYZ should require Jane to enter into a restrictive covenant as a prerequisite to employment?

- A. During her term of employment, Jane will have access to Company XYZ's confidential information, including its entire customer database and confidential information of its customers
- B. Company XYZ's biggest competitor, ABC Company, has been known to poach Company' XYZ's best sales associates
- C. During her interview with Company XYZ, Jane expressed desire to train as a brewmaster and open her own local brewery
- D. A and B
- E. All of the above

RESTRICTIVE COVENANTS – QUESTION 2

Company XYZ determines that it will require Jane to enter into a non-compete agreement in connection with her employment. When should Company XYZ first tell Jane that she will need to sign a non-compete agreement?

- A. During Jane's interview with Company XYZ
- B. When an offer of employment is given to Jane
- C. On Jane's first day
- D. One month after Jane begins working for Company XYZ

RESTRICTIVE COVENANTS – QUESTION 3

Company XYZ determines that it will require Jane to enter into a restrictive covenant as a prerequisite to employment. Which of the below best describes what Company XYZ should include in the restrictive covenant?

- A. Jane shall not sell any beverage in the seven county region for a period of one year
- B. Jane shall never sell beer in the seven county region
- C. Jane shall not sell beer in Pennsylvania for a period of six months
- D. Jane shall not sell beer in the seven county region for a period of five years
- E. None of the above

REFERENCE REQUESTS – DEFINITION

What is a Reference Request?

- A reference request is a request for job-related information regarding a current or former employee by a prospective employer
- Reference information may be used by the prospective employer to determine whether the candidate will receive an offer for employment
- In Pennsylvania, a conditional privilege applies to communications between prospective and current/former employers
 - Communications must be made on a proper occasion, from a proper motive, in a proper manner, and based on reasonable cause
 - There is a risk of defamation where conditional privilege is abused

REFERENCE REQUESTS – RISK OF DEFAMATION

When is an Employer Liable for Defamation?

- An employer may be liable for defamation where the employee can prove, by clear and convincing evidence, that the employer
 - knew the information was false or should have known it was false, had the employer exercised due diligence
 - provided information that was deliberately misleading
 - provided information that was false with reckless disregard as to whether it was true or false
 - violated the employee's contract, statutory, common law, or civil rights

REFERENCE REQUESTS – REFERENCE RESPONSE

Should an Employer Respond to a Reference Request?

- In Pennsylvania, an employer has no legal obligation to provide reference information;
 - Service Letter Statutes exist in certain other states
- The employer should establish a policy regarding reference requests and use the policy to determine whether and how to respond to a reference request
- The employer faces legal risks if the information that is response to a reference request is unfavorable

REFERENCE REQUESTS – REFERENCE RESPONSE (CONTINUED)

Should an Employer Respond to a Reference Request? (continued)

- When asked for reference information, the employer can avoid legal risks either by not responding to the reference request or by providing a “neutral” reference
- A neutral reference typically consists of only
 - dates of employment
 - positions held and final position
 - final salary

REFERENCE REQUESTS – NEGATIVE REFERENCE

What Should an Employer do if it Chooses to Provide Negative Information in Response to a Reference Request?

- The employer should obtain a release that is signed by the employee
- The employer should maintain and enforce a policy requiring management employee who receive reference request to forward those requests to the personnel department for a response
- The employer should provide substantive information concerning a former employee only in response to a request made by a prospective employer
- An employer should disclose reference information only to those individuals at the prospective employer who are involved in hiring decisions
- Any information that an employer provides should be accurate and truthful, and should be based on first hand or otherwise reliable knowledge

REFERENCE REQUESTS – REQUESTING

What Steps Should an Employer Seeking Reference Information Take to Encourage Other Employers to Provide that Information?

- The employer should request written permission from job applicant to do so, which should
 - identify, by name, the employers from whom reference information will be sought
 - identify with specificity the types of information that will be sought
 - authorize the employer to seek information
 - authorize the employer to furnish a copy of the signed form to the employers from whom reference information will be sought
- The employer should forward a copy of the signed form to the employers from whom the employer is seeking the reference information

REFERENCE REQUESTS – FACT PATTERN

Matt, a former customer service representative with ABC Company, interviews for a sales position with Company XYZ. Company XYZ is eager to hire Matt, but first requires a reference information from Matt's former employer. Julie, a Human Resource Representative from Company XYZ, calls Annabel, Matt's former supervisor at ABC Company, to request reference information regarding Matt.

REFERENCE REQUESTS – QUESTION 1

Of the choices below, which best describes how Annabel should respond?

- A. Annabel should decline to comment, citing that she has no obligation to provide reference information
- B. Annabel should decline to comment and direct the request to the Human Resource department
- C. Annabel should tell Julie that Matt was lazy and advise that Company XYZ not offer Matt the sales job for which he interviewed
- D. Annabel should tell Julie that, while Matt was an employee with ABC Company, Matt failed to meet his response quotas on 25 occasions over a one-year period
- E. None of the above

REFERENCE REQUESTS – QUESTION 2

Annabel directs Julie's request to Tom, a Human Resource Representative from ABC Company. Of the choices below, which best describes how Tom should respond?

- A. Tom should tell Julie that Matt was lazy and advise that Company XYZ not offer Matt the sales job
- B. Tom should request that Julie request the reference information in writing and that Julie provide a release signed by Matt
- C. Tom should tell Julie that Company ABC's policy is to confirm the employee's employment and to provide dates and last position held only
- D. A, B, and C
- E. B and C

THANK YOU



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Note: This document is not intended to give legal advice. It is comprised of general information. Employees facing specific issues should seek the assistance of an attorney.

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