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Mass High Court Refuses To Enforce General Release of Wage Act Claims

At some point, all employers will be in the unenviable position of wanting or needing to terminate an employee. Given the emotional consequences of being fired, coupled with the difficult job market, many terminated employees will sue or threaten to sue their former employer. Offering a departing employee a separation agreement can be an effective step to minimize exposure to employment claims and the costly litigation that ensues. Under such an agreement, the employer offers the terminated employee something to which he is not otherwise entitled (usually money or benefits). In exchange, the terminated employee agrees not to sue the employer for any claims arising from the employment relationship, such as discrimination, retaliation, misclassification and claims for unpaid compensation. Offering separation pay can be a great way to ease the transition for the departing employee while providing the employer with peace of mind. However, as one Massachusetts employer recently discovered, that peace of mind can be short-lived if the separation agreement is found to be unenforceable.

Although the decision in *Crocker et al. v. Townsend Oil*, SJC-11059 (12/17/2012), was a bad one for Townsend Oil, it is an early holiday gift to employers, providing helpful guidance about how to draft an enforceable separation agreement. The plaintiffs, Crocker and Barrasso, were home heating oil delivery drivers who the defendant, Townsend Oil, had classified as independent contractors. Townsend Oil terminated the plaintiffs' independent contractor agreements, essentially firing them. The parties negotiated a separation agreement: the defendant paid the plaintiffs several thousand dollars in exchange for their execution of a general release from any claim that arose from the plaintiffs' relationship. Thereafter, the plaintiffs learned that several of their former colleagues had successfully sued Townsend Oil for misclassifying them as independent contractors, and had recovered under the Massachusetts Wage Act. Notwithstanding the fact that the plaintiffs had signed general releases,

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they subsequently filed Wage Act complaints against Townsend for unpaid wages and overtime.

Townsend moved to dismiss on the basis that the plaintiffs had executed a broad release of claims that precluded them from recovering under the Wage Act. For their part, the plaintiffs argued that the general release was unenforceable because the Wage Act prohibits "special contracts" that circumvent the Act's requirement that employees be paid what they are owed and on time. That, the plaintiffs argued, is what the separation agreement amounted to.

The SJC's "Balanced" Ruling

The SJC found middle ground between the polar positions proffered by the plaintiffs and defendant. It ruled that a *general release* cannot effectively release a Wage Act claim, but also ruled that a retrospective release of Wage Act claims would be enforced if the release: (1) is "plainly worded"; (2) is "understandable to the average individual," and (3) "specifically refers to the rights and claims under the Wage Act that the employee is waiving." The SJC found that if these criteria were met, the proper balance is met between ensuring "that employees do not unwittingly waive their rights under the Wage Act," while preserving the "broad enforceability of releases by establishing a relatively narrow channel through which waiver of Wage Act claims can be accomplished." Because the separation agreements signed by Crocker and Barrosso did not explicitly include the release of Wage Act claims, the Court ruled that the plaintiffs were entitled to pursue damages they sustained as a result of the misclassification.

Take-Aways

The *Crocker* case is instructive on several bases. First, a separation agreement only helps an employer to the extent that its release provisions are enforceable. Some claims, particularly common law claims such as breach of contract, can be enforced through a general release. Other claims, primarily ones that derive from a statute, must be specifically released. The take-away here is that employers should not find separation agreements on Google, nor should they borrow or crib separation agreements from friends or colleagues. Employers should contact an employment attorney to assist drafting such agreements.

Second, separation agreements should not be written in "Legalese." They should be written in plain, simple and clear English. For the most part, use of words and phrases such as heretofore, whence, notwithstanding the statement preceding…and the like have no place in a separation agreement. Despite some perceptions, it is possible to draft an

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enforceable contract in terms that non-lawyers can understand.

Third, make sure you have offered the departing employee "consideration," or the agreement will not be enforced. *Consideration* is something of value to which a party is not otherwise entitled, such as separation pay. Here is an illustration in the context of a separation agreement. The Employee is offered a position with the Company. In the offer letter, the Company promises to provide the Employee with three weeks notice prior to termination, or to pay the Employee during the notice period. The Company decides to terminate Employee and wants to enter into a separation agreement. Such a separation agreement will not be enforced unless the Company offers the Employee something of value to which she is not otherwise entitled. Thus, the Company must either (i) permit the employee to work through the notice period, and then offer additional money or benefits, or (ii) pay the employee during the notice period, and then add additional money or benefits as consideration. The take-away is that payment during the three weeks notice period is not consideration because it is something to which the Employee already was entitled.

Finally, think hard about how to conduct the separation, including where it will happen (in a private space), when it will happen (when the office is as empty as possible), and who will deliver the message (preferably not someone with whom the terminated employee has an antagonistic relationship). Think ahead: have boxes available for the employee to clear out his belongings. If the employee takes public transportation to work, consider calling a taxi so the employee can bring home her boxes of belongings. In my experience, employees that sue are often those who feel mistreated. One of the best ways to minimize the exposure to employment lawsuits is to follow the golden rule and carry out terminations in a thoughtful and compassionate manner.

Kurker Law is an employment law firm located in Concord, Massachusetts, and serving clients throughout Greater Boston. Having worked at a multi-national Boston law firm before founding Kurker Law, Allyson Kurker has worked with a variety of clients, from Fortune 500 companies to family-owned businesses, and many in between. While Allyson's clients are varied, her approach is consistent: understand her client's business objectives; counsel clients so they can prevent employment disputes; find early resolutions when possible; litigate tenaciously when necessary.

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