Breaking up is hard to do but a good separation agreement can ease the pain

Every separation with an employee is unique. The law is constantly evolving, and, as the SEC continues to assess fines (some into the seven figures), the use of cookie-cutter separation agreement forms creates a risk of a truly painful breakup. Yet too many employers have yet to scrap historic provisions in their separation agreements that the SEC, NLRB, or EEOC view as unlawful.

Neil Sedaka's 1962 hit song "Breaking Up Is Hard To Do" still rings true not only for ex-lovers but also for ex-employees. However, there are ways to ease the pain. Well thought out separation agreements can help employers deal with failed relationships.

Here is a checklist for employers approaching a breakup with one or more employees:

1. Conduct a relationship retrospective – is there a prenup?

Most employees in the US are at will, meaning that the relationship can be terminated at any time by either the employer or the employee. Bu when you are considering a termination, you also need to determine whether there are agreements that address obligations of the employee and/or employer upon separation. Employers should review the employee's personnel file for any relevant contracts, such as an employment agreement; offer letter; restrictive covenant agreement (*eg,* NDA, non-compete, or non-solicit); stock award; severance plan; or promissory note. The starting point for any separation agreement should be any applicable provisions in those agreements concerning what happens in the event of a breakup even though the parties are free to reach a mutual agreement that may alter and/or supersede any previously agreed-upon terms.

2. Money can't buy love, but it can buy peace: get a proper release of claims

Employers should consider offering employees a separation payment in exchange for a broad release of claims against the company. Unless an employee already has a contractual right to a certain severance amount, there is generally no magic amount that an employer must offer in exchange for a release. Employers often use length of service to determine the severance amount: *eg,* X weeks of severance pay for each year of the employment relationship, up to some cap.

An effective release will include a comprehensive waiver of both common law and statutory claims. The release, however, must not include claims that cannot be waived as a matter of law – for example, an employee cannot waive the right to file a charge with the EEOC; claims under the FLSA generally cannot be waived; and many states (including, but not limited to, California, Florida, Illinois, New York, and Texas) prohibit waiver of claims for unemployment and/or workers' compensation benefits.

1. **R-E-S-P-E-C-T thine elders**

For a one-off separation with an employee who is age 40 or over, be sure to provide the 21-day review period and 7-day revocation period required for a waiver of claims under the Age Discrimination in Employment Act (ADEA), as amended by the Older Workers Benefit Protection Act (OWBPA). A litany of other OWBPA factors (commonly put in a single paragraph) must also be included.

In the event of a company restructuring or other reduction-in-force program, a valid ADEA/OWBPA waiver requires that separating employees aged 40+ also be provided (i) a 45-day review and consideration period (and the same 7-day revocation period) and (ii) information (usually provided in chart form) of the job title and age of those individuals included in the layoff, along with the job title and age of those individuals within the same "decisional unit" who are not being terminated.

1. **Wash those unlawful provisions out of your agreements**

Well thought out agreements are not only customized but current.

Let's look at the most recent clauses that legal developments require be deleted:

- Clauses prohibiting the employee from communicating with a government agency about a potential violation of law (or requiring the employee to first inform the company before disclosing such information to a government investigator)
- Clauses barring (or limiting by requiring prior notice and permission from the company) the employee from cooperating with the government in a complaint or investigation against the company
- Clauses precluding the employee from a monetary recovery awarded in an action brought by a government agency (*eg* , whistleblower claim under the Dodd-Frank Wall Street Reform and Consumer Protection Act)
- Clauses preventing the employee from making any disparaging (even if true) comments about the company or its officers, directors, or employees to government officials/agencies.

There are many ways to comply: *eg*, eliminate overreaching and cut the unnecessary. At the very least, a disclaimer that "nothing in the agreement precludes the employee from providing truthful information to, or participating in, an investigation or proceeding conducted by a government agency" is a good temporary stopgap.

1. **Protect the crown jewels**

Companies certainly have the right to maintain and protect their property, confidential information and goodwill. A separation agreement should incorporate any existing restrictive covenants that an employee has signed, including but not limited to provisions governing non-disclosure of confidential information, non-competition and non-solicitation of clients and employees. It may also expand on those or add those for employees with no such agreements. NB: for now, let's assume that those are all perfectly proper even though – given the ever-changing landscape of non-compete law and the practical limits on making each such agreement both customized and current – that may be a polite fiction.

In drafting non-disclosure provisions, employers must also be mindful of the Defend Trade Secrets Act of 2016. Pursuant to that statute, employees should include the DTSA-mandated notice in all non-disclosure agreements, namely that employees will not be held liable for disclosing a trade secret either (i) in confidence to a government official or to an attorney, for the sole purpose of reporting or investigating a suspected violation of law; or (ii) in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal.
