

Member's Quarterly

Winter 2022 Edition

Feature

Release of Liability: Go Beyond the Regular Entitlements

How to avoid the pitfalls

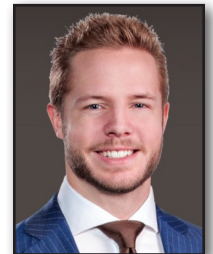
If you are an employer or manager, you will likely need to utilize a Release of Liability ("Release") at some point in time in connection with the conclusion of an employee's employment or when resolving some other employment-related dispute. A Release is an important tool for an employer as it is a legal, contractual document intended to, well, "release" an employer from potential (or actual) liabilities by legally barring legal action associated with an employee's employment and conclusion of employment.

Needless to say, when using a Release, an employer's end goal is for the Release to be a valid and binding legal instrument. However, various pitfalls exist that could upset this employer-intent and leave the Release vulnerable to successful legal challenge. To proactively avoid an employee successfully challenging the enforceability of a Release, and in turn, an employer's unanticipated ongoing possible liability for damages, we have developed the following "Release Checklist":

1. Make sure the Release is drafted in a clear, unambiguous manner. Any ambiguities will be interpreted by a Court in favour of the employee, often to the employer's detriment.
2. Make sure the scope of the Release (i.e. what it covers off) is sufficient. If the Release is intended to be all-encompassing, it must generally address all potential legal actions that could be pursued in the circumstances. But further, it should also specifically address any legal action(s) already commenced by the employee. Failure to address the latter could result in the employee being permitted to continue the existing legal action(s) until they are resolved. Important elements we often see missed in a Release include:
 1. Claims arising from loss of benefits;
 2. Claims arising from the entire employment- not just the conclusion of employment;
 3. Claims under applicable statutes such as the Employment Standards and Human Rights Legislation (Seek legal advice on this as there are contextual concerns and exceptions); and
 4. Express confirmation that the employee has been advised of their right to independent legal advice prior to signing.
3. Make sure the employee is provided with a genuine opportunity to review, seek legal advice and consider the Release prior to agreeing to its contents. This will require an employer to afford a fair, reasonable amount of time to an employee to decide whether they will ultimately agree to and execute the Release. Failure to do so could result in the Release being unenforceable, particularly if the employee in question is less sophisticated, vulnerable etc. When presented with a Release, some employees will want to sign and agree to it "on the spot". While this may seem like great news for you as the employer, we recommend expressing thanks to the employee for their cooperative approach, but still asking that they at least take the Release home and sleep on it. If they remain comfortable with the proposal the next day, you would be pleased to receive the signed Release at that time.



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4. Make sure the employee is provided with "fresh consideration" in exchange for agreeing to the Release. For a Release to be enforceable, the employee must be provided with some form of payment that they are not already legally entitled to (for example, pursuant to a statute or the terms and conditions of their employment contract). If, in exchange for agreeing to and executing a Release, the employee is only receiving a payment that they were already legally entitled to receive, the employer has failed to provide the employee with "fresh consideration" and the employer will not be able to legally rely on the Release. Some common examples of this pitfall include providing an employee with their final pay, accrued but unused entitlements (such as vacation pay or banked overtime), and/or statutory termination pay but nothing more in exchange for the employee's agreement to the Release. Also be careful to never require that a Release be signed as a condition of receiving these statutory entitlements.

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