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RELEASE & RESIGNATION AGREEMENTS (LTD/STD/PTO) PRESENTATION

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BY

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Barry Montgomery is a partner with KPM LAW and began his career in litigation before he graduated law school by working as an intern at the United States Attorney's office where he had the opportunity to prosecute federal criminal cases. While Barry represents insurers and their insureds in commercial litigation with a concentration on labor and employment law and litigation, as well as professional liability litigation.

Barry has first chair trial experience in over 75 jury trials in state and federal court and regularly represents clients before the United States Equal Employment Opportunity Commission, the Virginia Department of Labor & Industry and professional regulatory boards. He has prosecuted and defended multi-million dollar cases to verdict. Barry is a graduate of James Madison University and the University of Richmond School of Law."

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Francie Georges graduated from the University of Toledo College of Law in 1997. Upon graduation she was selected for a clerkship in the Staff Attorney's office for the United States Court of Appeals for the Fourth Circuit. She then joined KPM, where she has practiced for the last 24 years, initially handling the defense of auto accident, premises liability and commercial claims. Francie was then promoted to partner at the firm, where she has helped to build and now co-manages the firm's Workers' Compensation Practice Group. She is also a mentor within the firm and manages training for the firm's attorneys and staff.

Francie holds an AV-preeminent rating from Martindale Hubble. She currently defends workers' compensation claims for an array of clients across the Commonwealth from local to major international corporations. She is also frequently called upon by her clients to use her expertise in training and onboarding new adjusters and guiding her corporate clients in improving safety measures.

EMPLOYMENT SEVERANCE AGREEMENTS IN VIRGINIA WORKERS' COMPENSATION CASES

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Introduction:

Employers often face the conundrum of terminating an employee with an active workers' compensation claim. Employees have many rights under federal, state and local laws and these rights often overlap and intersect with the rights conferred by Virginia's Workers' Compensation laws. Severance agreements, if drafted properly, can and should address and settle all of these rights/claims in order to achieve a smooth separation of employment.

I. Legal Protections for Workers' Comp. Claimants

Non-Retaliation for Filing Comp. Claim

Va. Code Ann. § 65.2-308 states that "no employee or person shall discharge an employee *solely* because the employee intends to file or has filed a claim under" the Virginia Workers' Compensation Act. Most states have similar provisions in the Workers' Comp. statutes. (See Okla. Stat. Tit. 40 §403(B); Illinois Work Comp. Act. 820 ILCS 305/1; California Labor Code §132a)

The Virginia statute has been narrowly and strictly applied by the courts. "Code § 65.2-308 requires that [a plaintiff] present evidence which establishes that he was terminated *solely* because he had intended to file a workers' compensation claim."

Cooley v. Tysons Foods, 257 Va. 518, 521, 514 S.E.2d 770, 772 (1999). The Virginia Supreme Court has made it clear that:

> "Every employee injured in an accident arising out of an in the course of her employment presumably will make a claim for compensation benefits. So testimony of these events and the employer's knowledge that the employee was 'reporting' the injury, without more, does not raise an inference that the plaintiff was fired solely because she intended to file a workers' compensation claim. Otherwise, a question of fact on this issue would arise in every case merely upon proof that an employee had been fired after a work-related injury. We refuse to establish such a precedent."

Jordan v. Clay's Rest Home, 253 Va. 185, 193, 483 S.E.2d. 203, 207 (1997). Therefore, "Under Virginia law, closeness in time alone is insufficient to establish a *prima facie* violation of Va. Code § 65.2-308." Taylor v. Wal-Mart Stores, Inc. 376 F. Supp. 2d 653, 664 (E.D.Va. 2005).

For example, in Jordan, "the plaintiff presented evidence that she was injured at work, that she had been performing her duties satisfactory, that her supervisor knew she was 'reporting' the injury as work-related, and that she was discharged three days later." O'Connell v. Isocor Corp., 56 F. Supp. 2d. 649, 655 (E.D.Va. 1999) (summarizing the facts presented and holding of the Virginia Supreme Court in *Jordan*). Based on those facts, the Virginia Supreme Court held that where the only evidence was that the termination was "close in time to the date she notified her employer of her intention to file for workers' compensation, and such evidence is insufficient, as a matter of law, to go to the jury. Id.

- **Severance agreements should include broad language releasing any and all claims arising out of the employment relationship. However, the severance agreement should also specifically refer to any rights the employee might have under §65.2-308, Code of Virginia.**

Constructive Discharge Arguments

The Virginia Supreme Court has not yet ruled on the issue of whether a plaintiff can assert a wrongful termination claimed based upon constructive discharge. However, in a recent decision by the U.S. District Court for the Western District of Virginia, that court, after conducting an exhaustive analysis, concluded that the majority of Virginia trial courts have recently allowed such claims. Faulkner v. Richard Dillon, et al. 92 F.Supp.3d 493 (W.D. Va. 2015).

To stablish constructive discharge, a plaintiff must show that the termination was in violation of 'clear and unequivocal public policy of this Commonwealth, that no person should have to suffer such indignities,' and that the employer's actions were deliberate and created intolerable working conditions. See Faulkner. An employee could argue that by actions take to discourage workers' compensation claims amounted to a constructive discharge of employment leading to a wrongful discharge lawsuit.

- Severance agreements should contain provisions stating that the employee agrees that the employer has not discouraged, prohibited, retaliated against the employee or created a "hostile work environment" due to the employee making or supporting any worker's compensation claims or safety (OSHA) complaints.

Payment of Wages:

During severance negotiations, a claimant may complain that the employer is not offering sufficient severance payments to cover money owed for work performed prior to the work related injury---**including commissions or bonuses owed**. The Virginia

"Payment of Wages" law (See §40.1-29, Code of Virginia, requires regular payment of wages owed at regular intervals. That law also provides:

> "D. No employer shall require any employee, except executive personnel, to sign any contract or agreement which provides for the forfeiture of the employee's wages for time worked *as a condition of employment or the continuance therein*, except as otherwise provided by law."

Severance agreements must make clear that the employee agrees that the payments are in full satisfaction of all previously earned wages (and that the sum actually covers them). The agreement should also acknowledge that the employer has not retaliated against the employee for asserting his or her right to payment.

A federal court upheld an "at will" salaried employee's state common law claim of wrongful retaliatory discharge connected with Virginia Payment of Wages law. See Lester v. TMG, Inc., U.S District Court, Eastern District of Virginia, No.: 2:12cv421 (September 13, 2012). Lester argued that he was fired after he sent e-mails to his supervisors protesting the failure of his employer to pay certain wages. The court noted that Virginia's "Payment of Wages" law (See §40.1-29, Code of Virginia) established a public policy that allows and encourages all employees to challenge the employers' determination of wages. The federal court held that if the employee could prove that he was terminated in direct retaliation for challenging his employers determination of wages, then he could assert a wrongful termination claim despite his "at will" status. Simply put, the employer could not terminate Lester based on his decision to exercise

his right conferred by statute to protest his employer's determination of wages. See also Katz v. Enterprise Solutions, Inc., 2005 U.S. Dist. LEXIS 37077 (E.D. Va. 2005)

II Complying With Federal Laws

Most employers have encountered the headache that comes with navigating the Workers Comp. Act when it intersects with an employee's federally protected employment rights. When an employee is injured on the job various federal laws (and state laws) including the Family and Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA) are also implicated. Severance agreements should specifically address those rights:

a. Who is covered under FMLA?
    i. Employer (must have 50 or more employees for each working day during 20 or more workweeks of the current or preceding year).
    ii. Employees (Must have been employed for at least 12 months or 1250 hours for the past 12 months and employed at a worksite with 50 or more employees).
    See 29 CFR §2611(2)(A)
b. Who is covered under ADA?
    i. Employer: The ADA applies to employers with 15 or more employees. (42 U.S.C. §12111(2). Applied to private and state/local government employers but excludes federal government and native American tribes. See Jones v. Sternheimer, 387 F.Appx. 366 (4th Cir. 2010).

ii. Employees: an individual with a disability, qualified for the job, and can perform the essential functions of the job with or without reasonable accommodation.
See Tyndall v. National Educ. Ctrs., 31 F.3d 209, 213 (4th Cir. 1994).

"Essential Job Functions" are those takas that are fundamental to the employment position. See 42 U.S.C. §12111(8)

The ADA looks to 2 sources to determined which functions are "essential":

- The employer's own judgment due to business necessity;
- Written job descriptions or job advertisements;

See 29 C.F.R §1630.2(n)

Accordingly, it is important that all employers maintained detailed *and updated* job descriptions on file to reflect changes due to the implementation of new technology or equipment.

iii. Protections afforded under the ADA (see below)

c. Workers' Compensation: Who's covered?

i. Employers: Generally all employers, but some states only require employers with a minimum number of employees.

ii. Employees: An individual who performs services for hire ("an employee") who sustains an injury or develops occupational disease in the course of and resulting from their employment.

iii. Benefits available under workers' comp

1. Medical benefits
2. Temporary total disability benefits
3. Permanent partial disability benefits
4. Vocational Rehabilitation benefits

2. Qualifying Conditions

a. FMLA qualifying conditions (See 29 U.S.C. §2612(a)(1); 29 CFR §824.112)

i. An employee's "serious health condition" or subsequent treatments;

ii. The birth of a child, and to care for the newborn child;

iii. To care for the employee's spouse, child, or parent with a "serious health condition";

iv. The placement of a child with the employee through adoption or foster care;

v. For qualifying exigencies arising out of active duty status. (26 weeks of leave available for injured or ill service member.)

b. ADA qualifying condition

i. Disability

- This term is defined broadly by the ASA as meaning a physical or mental impairment that substantially limits one or more major life activity, a record of having such an impairment or merely being "regarded" or "perceived" as having such an impairment.

  See 29 C.F.R. §1630.2(g)

- The ADA was recently amended such that the definition of disability should be "construed in favor of broad coverage of individuals. 42 U.S.C. §12102(4)(A);

- The Equal Employment Opportunity Commission ("EEOC"), has stated that the following conditions "virtually always" substantially limit a major life activity:

1. Deafness;
2. Blindness;
3. Missing limbs or wheelchair bound;
4. Autism, cancer, cerebral palsy, diabetes
5. HIV/AIDS;
6. Psychiatric disorders including major depressive disorder

See 29 C.F.R § 1630.2(j)(3)(iii)

c. Workers' Compensation qualifying condition

i. An injury or disease sustained in the course of and resulting from employment.

ii. "No fault" system

3. Notice Requirements

a. FMLA Notice Requirements

i. An Employees' Notice Requirement

1. Formal Notice

2. Constructive Notice

ii. Employers' Responsibilities upon receiving notice

1. Eligibility Notice

2. Rights and Responsibilities Notice

b. ADA Notice Requirements

i. Employees' Responsibilities

ii. Employers' Responsibilities

c. Workers' Compensation Notice Requirements

4. Leave of Absence

a. Duration of leave

i. FMLA (up to12 weeks; 26 to care for a service member)

▶ Employee can request Intermittent leave such that FMLA leave taken in separate blocks of time due to a single qualifying reason. See 29 CFR §825.202(a);

▶ However, The employee needing intermittent FMLA leave must make efforts to schedule their leave so as not to unduly disrupt the employer's operations. See Ranade v. BT Ams., Inc., 581 Fed. Appx. 182 (4th Cir. 2014); 29 CFR § 825.203

ii. ADA

iii. Workers' Compensation

b. Reinstatement after leave

i. FMLA

ii. ADA

iii. Workers' Compensation

Conduct Prohibited by the ADA:

- The ADA prohibits an employer from taking the following actions towards disabled employees: (See 42 U.S.C. §12112(b)

1. Limiting, segregating or **classifying** employees in a way that adversely affects employment opportunities or status;

2. Using standards or methods of operation that discriminate against disabled employees;

3. **Failing to make a reasonable accommodation for a disabled employee *unless* the accommodation would impose an undue hardship on the employer.** (this is a heavily litigated area). **The ADA requires an employer to provide a reasonable accommodation that enables the disabled employee to perform the essential functions of her job or enjoy the same benefits of employment as those similarly situated employees without disabilities.**

See 29 CFR §1630.2(o)(1)

The ADA requires the employer to make a "reasonable accommodation, not a perfect one." See Adams v. Anne Arundel County chool System, 789 F.3d 422, 432 (4th Cir. 2015);

The employer is not required to provide the employee with the specific accommodation requested but only to reasonable accommodate so that the

employee can perform the essential job functions. EEOC v. Newport News Shipbuilding, 949 F.Supp. 403 (E.D. Va. 1996)

The employer is not required to create a new position for the employee or transfer another employee out of a job. Carroza v. Howard County, 45 F.3d 425 (4th Cir. 1995).

- **EXCEPTION: UNDUE HARDSHIP TO THE EMPLOYER**

- Remember the disabled employee cannot require the employer to make an on the job accommodation that imposes an **undue hardship** on the employer.

- The following factors are used to evaluate whether an accommodation imposes an "undue hardship":

    1. The nature and net cost of the accommodation;

    2. The financial resources or facilities of the employer and the facility the number of employees at the facility and effect on the expenses of the facility;

    3. The type of operations of the employer including the structure and functions of the workforce and geographic locations;

    4. Whether the accommodation would be disruptive to the business or pose a danger to others.

See 42 USC §12111(10); 29 CFR §1630.2(p)

Severance Agreements Can NOT Interfere With Federal EEO Enforcement Rights

- Some federal employment laws, including Title VII of the Civil Rights Act, ADA, the Americans with Disabilities in Employment Act, FMLA, prohibit an employer from interfering with an employee's rights to file a charge of discrimination or testifying/participating in a proceeding

- However, an employee CAN agree not to enforce his own right to a financial recovery under these laws while retaining her right to file a complaint and otherwise enforce the EEO laws.
- While a private agreement can eliminate an individual's right to personal recovery, it cannot interfere with EEOC's right to enforce Title VII, the EPA, the ADA, or the ADEA by seeking relief that will benefit the public and any victims of an employer's unlawful practices who have not validly waived their claims. See EEOC v. Harris Chernin, Inc., 10 F.3d 1286, 1291-92 (7th Cir. 1993); EEOC v. United Parcel Serv., 860 F.2d 372, 374 (10th Cir. 1988); EEOC v. Goodyear Aerospace Corp., 813 F.2d 1539, 1542-43 (9th Cir. 1987); New Orleans S.S. Ass'n v. EEOC, 680 F.2d 23, 25 (5th Cir. 1982); EEOC v. McLean TruckingCo., 525 F.2d 1007, 1010 (6th Cir. 1975)

III Non-Disclosure/Confidentiality Agreements

- These are generally enforceable. However certain governmental employers could be obligated to disclose settlement amount under Virginia's Freedom of Information Act. See §2.2-3700, et seq. Code of Virginia

However, Certain Exceptions May Apply:

Sexual Harassment/Assault Laws:

- In the Wake of the #MeToo movement, some states have passed legislation prohibiting the sued of confidentiality agreements for sexual harassment/assault cases in employment agreements, including settlement agreements.
- A bipartisan bill was introduced in Congress but was never passed:
  - EMPOWER ACT House Bill (Rep. Jerry Nadler- D, NY; Rep. Barbara Comstock, R-VA);
  - Senate version of the Bill sponsored by Kamala Harris (D-CA) and Lisa Murkowski (R-AK)

IV Amending/Editing Settlement Agreements

Virginia law prohibits concerning "blue-penciling" contact terms. Consequently, clauses that are unenforceable do not render the entire contract unenforceable, the Court simply strikes out those clauses but can't modify or rewrite them . See The Metis Group, Inc. v. Allison, 104 Va. Cir. 111, 119 (Fairfax County, January 8, 2020); citing to Reistroffer v. Person, 247 Va. 45, 49-50, 439 S.E.2d 376, 10 Va. Law Rep. 719 (1994).

"Virginia courts do not, however, rewrite contracts for the business world. While Virginia courts will strike down efforts at establishing monopolies and overly broad restraint of trade, the courts are not in the business of writing contracts." The Metis Group, Inc. v. Allison, 104 Va. Cir. 111, 119 (2020);

While the Courts are not allowed to rewrite contracts, they can strike out only the offending/illegal provision while enforcing the non-offending provisions.