A Q&A guide to release of claims agreements for private employers in California. This Q&A addresses statutory and common law claims that may be released in a valid and enforceable written agreement as well as employment claims or specific contract language that should be included or excluded. Federal, local or municipal law may impose additional or different requirements. Answers to questions can be compared across a number of jurisdictions.

EMPLOYMENT CLAIMS THAT SHOULD BE RELEASED

1. What state-specific employment-based claims (statutory and common law) should be included in a release of claims agreement?

STATUTORY AND COMMON LAW CLAIMS

A release can require an employee to waive most state statutory claims and common law claims, including:

- Breach of the implied covenant of good faith and fair dealing.
- Privacy violations.
- Defamation.
- Intentional infliction of emotional distress.
- Discrimination and harassment claims under California’s Fair Employment and Housing Act. (Skrbina v. Fleming Cos., Inc., 45 Cal. App. 4th 1353 (1996).)

Employees may also validly waive potential claims unknown to the employee when signing the release, if the employer has inserted specific language mentioning Section 1542 of the California Civil Code in the release (see Question 5). If the employee agrees to release unknown claims and later learns of grounds for a claim of wrongful termination arising from incidents occurring before the release is signed, the employee’s claims are barred.

GENERAL RELEASE OF “ANY AND ALL” CLAIMS

It is common practice in California for employers to use a general release of claims. In addition to relevant federal claims, the wording of the general release waives and releases:

- All known or unknown claims based on state, municipal, or local employment discrimination statutes, laws, regulations or ordinances, including, but not limited to, claims based on:
  - age;
  - sex;
  - race;
  - religion;
  - national origin;
  - marital status;
  - sexual orientation;
EMPLOYMENT CLAIMS THAT SHOULD NEVER BE INCLUDED IN A RELEASE AGREEMENT

2. Certain employment-based claims are never permitted to be released under law. They can invalidate an otherwise valid release agreement if included. Please identify any of these claims in your state.

CLAIMS FOR UNDISPUTED WAGES

California employers cannot require an employee to sign a release of claims or rights to wages that are undisputedly due, such as minimum wage and overtime pay (Cal. Lab. Code § 206.5).

To be valid and enforceable, a release must offer an employee something that she was not already entitled.

A release must not allocate any portion of monetary consideration to wages that are due, or are being paid, at the time of discharge. This includes payment to the employee for any accrued and unused vacation time, that an employee is legally entitled to on termination and cannot be forfeited (Cal. Lab. Code § 227.3).

An employer also may not require an employee, as a condition of payment, to execute a statement of hours worked during a pay period, that the employer knows to be false (Cal. Lab. Code § 206.5(b)).

An employee may only release a claim for wages that were subject to a bona fide dispute between the parties over whether the wages were owed. A release required or executed in violation of Section 206.5 of the California Labor Code is unenforceable.

UNEMPLOYMENT INSURANCE CLAIMS

An employer may never require an employee to sign a release of claims waiving her unemployment insurance claims. Further, payment of severance to an employee as consideration for a release of claims does not affect the employee’s eligibility to receive unemployment benefits and is not deducted from any unemployment compensation that the employee is awarded.

RIGHT TO FILE CHARGES WITH THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Employees may not waive the right to file charges with the federal Equal Employment Opportunity Commission (EEOC) (Davis v. O’Melveny & Myers, 485 F.3d 1066 (9th Cir. 2007)). However, an employee will not be compensated a second time by the EEOC for an alleged injury that he was already compensated for as consideration for the release.

WORKER’S COMPENSATION CLAIMS

Workers’ compensation claims cannot be waived in an ordinary release of claims or separation agreement. To settle or release a workers’ compensation claim, the parties must use a specific form Compromise and Release agreement, that requires approval.
EMPLOYEE RIGHTS UNDER CALIFORNIA LABOR CODE §§ 2800 TO 2810

Section 2804 of the California Labor Code prohibits employers from requiring an employee to release claims or rights due under the California Labor Code. These provisions confer:

- Employee indemnification rights.
- Rights to bring actions for wrongful death and personal injury against the employer in certain circumstances.
- Medical coverage.

A general release of all claims that does not specifically exempt these rights does not violate Section 2804 of the California Labor Code. Rather it simply does not release claims under the provisions that Section 2804 governs, which provide that:

- **Section 2800.** An employer must indemnify an employee for losses caused by the employer's negligence.
- **Section 2802(a).** An employer must reimburse an employee for business expenses and indemnify the employee against claims brought in the course and scope of employment. Section 2802(a) of the California Labor Code states that an employer must indemnify an employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his duties, or of his obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.
- **Section 2803.** When death results from an injury to an employee caused by lack of ordinary or reasonable care of an employer or of any officer, agent or a servant of the employer, that employee's personal representative has a right of action against the employer and may recover damages for and on behalf of the surviving spouse, children, dependent parents, and dependent brothers and sisters, in order of precedence as stated. Only one action can be brought for such recovery.
- **Section 2806(a).** No employer may discontinue employee coverage for medical, surgical, or hospital benefits unless the employer, at least 15 days in advance, has notified all covered employees in writing of any discontinuation of coverage. This includes nonrenewal and cancellation, but excludes discontinuation due to employment termination or where substitute coverage has been provided.

WRONGFUL DISCHARGE BASED ON MILITARY SERVICE

Claims of wrongful discharge based on military service may not be waived in a release (Perez v. Uline, Inc., 157 Cal. App. 4th 953 (2007)).

EMPLOYMENT CLAIMS THAT MAY BE INCLUDED IN A RELEASE OF CLAIMS AGREEMENT UNDER CERTAIN CIRCUMSTANCES

3. Certain employment claims may be included in a release of claims agreement without invalidating the agreement under certain circumstances (for example, Fair Labor Standards Act claims can be validly released if approved by the Department of Labor or a court). Please identify any of these claims in your state.

BONA FIDE DISPUTED WAGES AND WAGES ALLEGEDLY OWED AFTER TERMINATION

The California Labor Code prohibits the release of claims for wages that are undisputedly owed and due to employees up to their termination date. However, employees can execute valid releases of wage claims where there is a bona fide dispute as to whether the wages are owed. Where consideration is exchanged for a release, the employer should be able to allocate part of that sum to compensation allegedly owed after the date of termination (that is, compensation that the employee would have earned but for the termination).

Employers should be able to negotiate wage claim releases with employees that include known and unknown wage claims as long as the releases:

- Do not require an employee to release all disputed amounts to receive an undisputed balance.
- Are not otherwise coerced or based on false information.
- Contain the employee's acknowledgement that the employer has paid all wages due without any strings attached.
- State that any consideration offered as part of the agreement for the release is above and beyond what the employer owed.

If the release agreement is resolving a dispute, the release should describe the dispute. To avoid claims of coercion, the employer should also consider:

- Giving the employee ample opportunity to consider the release.
- Encouraging the employee, in writing, to speak with counsel before signing the release.

Finally, the language used in the release should be straightforward and easy to understand. It should:

- Specific the claims the employee will relinquish by signing it.
- Accept the benefits the employer is offering in exchange for the release.
WAIVER OF EMPLOYMENT AGENCY COMPLAINTS

4. Please identify any state governmental agencies in your state that oversee the administration of state employment laws and indicate whether complaints to those agencies may be validly waived in a release of claims agreement.

CALIFORNIA WORKER’S COMPENSATION APPEALS BOARD

A release will not extinguish an employee’s right to recovery under state workers’ compensation laws, unless the California Workers’ Compensation Appeals Board has both:

- Formally approved the release.
- Found the consideration paid to be sufficient.

(Cal. Lab. Code § 5001.)

Claims for discrimination against workers’ compensation claimants under Section 132a of the California Labor Code also are presumably subject to this approval requirement because the penalty for discrimination partially consists of an increase in the employee’s workers’ compensation award (Cal. Lab. Code § 132a(1)).

DISCRIMINATION CLAIMS BEFORE THE EEOC

An employer may not require an employee to waive the right to bring administrative discrimination claims to the Equal Employment Opportunity Commission. The employer, however, can require the employee not to bring a lawsuit in court for discrimination claims.

OTHER ISSUES FOR RELEASE AGREEMENTS

5. Please describe any other issues particular to your state that should be considered when drafting an enforceable release agreement.

WAIVER OF UNKNOWN CLAIMS: CALIFORNIA CIVIL CODE § 1542

Unless expressly waived, Section 1542 of the California Civil Code precludes a general release from including claims unknown to the employee at the time the release is signed that, if known, would have materially affected the employee’s decision to sign the release.

Explicit Reference in General Release

To be effective, the intent to waive the protections of Section 1542 must be clear. The best practice is to quote the statutory language in its entirety in the release, as follows:

EMPLOYEE hereby waives the provisions of section 1542 of the California Civil Code, which states:

“A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.”

Some employers choose to further highlight the statutory language by placing it in all capital letters.

To avoid ambiguity as to whether the employee intended to waive the protections of Section 1542, employers should also consider adding additional language that clearly reflects the employee’s intent to release all claims, known and unknown, in plain language.

Effect of Not Referencing California Civil Code § 1542

Nothing in Section 1542 requires that it be included in the release or that a party specifically waive its provisions. The absence of an explicit waiver of rights under Section 1542 of the Civil Code will not invalidate the release. However, if the employee does not explicitly waive the protections of Section 1542, the general release of claims risks not covering claims that were unknown to the employee when the release was signed.

For example, the absence of an explicit waiver of Section 1542 rights in a broadly worded release generally does not preclude enforcement of the release that states that the employee waives all claims existing at the date he signed the release arising from or relating to his employment or its termination, including:

- Any claims arising under common law, such as:
  - contract;
  - implied contract;
  - tort; or
  - public policy.
- Statutory claims, such as those under specified legislative enactments.
- Any other federal or state law, statute, decision, order, policy or regulation establishing or relating to claims or rights of employees, including:
  - claims in tort or contract, based on public policy;
  - claims alleging breach of an express or implied, or oral or written, contract, or alleging misrepresentation, defamation, interference with contract, or wrongful discharge.

So long as the employee understands she is releasing claims arising under all statutes that the agreement refers, even those she does not understand, it is likely sufficient to withstand the provisions of Section 1542 of the Civil Code. However, including Section 1542 in the release helps avoid ambiguity.
California’s Fair Employment and Housing Act, rehire or reemployment rights and any and all claims based on state, municipal or local employment discrimination statutes, laws, regulations or ordinances, including, but not limited to age, sex, race, religion, national origin, martial status, sexual orientation, ancestry, parental status, handicap, disability, veteran status, harassment, retaliation, attainment of benefit plan rights, claims for severance pay, claims based on breach of contract, wrongful termination, defamation, intentional infliction of emotional distress, tort, personal injury, invasion of privacy, violation of public policy, negligence or any common law, statutory or other claim whatsoever arising out of or relating to employment with or separation from employment with the employer, provisions of section 1542 of the California Civil Code, [wage claims where there is a bona fide dispute as to whether the wages were owed].

**PRINCIPLES OF FAIRNESS**

**Knowing and Voluntary**

To be effective, a release of claims must be made knowingly and voluntarily. It cannot be obtained by:
- Fraud.
- Deception.
- Misrepresentation.
- Duress.
- Undue influence.

**Economic Duress**

Economic duress may arise if an employer’s efforts to obtain a release could be viewed as engaging in a wrongful act that was sufficiently coercive to cause a reasonably prudent person faced with no reasonable alternative to succumb to the employer’s pressure. The courts apply this doctrine in limited circumstances and only as a last resort. To invalidate a release under the economic duress doctrine, the employee must establish:
- The employer knew there was no legitimate dispute and that it was liable for the full amount at issue.
- The employer nevertheless refused in bad faith to pay and thereby placed the employee at imminent risk of bankruptcy.
- The employer, knowing the vulnerability its own bad faith had created, used the circumstances to escape an acknowledged debt.
- The employee was forced to accept an inequitably low amount.

**Unconscionability**

The employee also may assert the doctrine of unconscionability to invalidate a release. Unconscionability focuses on oppression or surprise due to unequal bargaining power that results in overly harsh or one-sided results. Both inequality in bargaining power and one-sidedness in results must be present in the same degree to justify invalidating a release as unconscionable.

**STATE CLAIMS IN RELEASE PARAGRAPH**

6. Please provide a paragraph that can be inserted into a separation and release of claims agreement identifying all state-specific claims (statutory and otherwise) that can be released in your jurisdiction.

**LIST OF CLAIMS**

Wrongful termination in violation of public policy (Tameny claims), breach of contract, breach of the implied covenant of good faith and fair dealing, privacy violations, defamation, intentional infliction of emotional distress, discrimination and harassment claims under...