



Employment Claims in Release Agreements: New York

*Scott J. Wenner and Alizah Z. Diamond,
Schnader Harrison Segal & Lewis LLP*

This Article is published by Practical Law Company on its ^{PLD}Labor & Employment web service at <http://us.practicallaw.com/6-505-9860>.

A Q&A guide to release of claims agreements for private employers in New York. 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?

New York law does not require a release of claims agreement to contain an express provision releasing particular statutory or common law employment claims for the release to be effective for those claims.

Still, it is common practice in New York to include a non-exhaustive list of specific claims as examples of the types of claims released.

Common law claims frequently listed as examples of the types of claims released include:

- Breach of express or implied contract.
- Wrongful or retaliatory discharge in violation of public policy.
- Breach of the covenant of good faith and fair dealing.
- Interference with contractual relations or prospective business advantage.
- Defamation, slander or libel.
- Invasion of privacy.
- Intentional and negligent infliction of emotional distress.
- False imprisonment.
- Fraud.

Statutory claims frequently listed as examples of the types of claims released include claims for:

- Employment discrimination, retaliation or unlawful harassment under the New York State Human Rights Law (*N.Y. Exec. Law §§ 290 to 301*) and the New York City Human Rights Law (*N.Y. City Admin. Code §§ 8-101 to 8-1103*).
- Retaliation against employee whistleblowing under the New York Retaliatory Action by Employers Law (RAEL) (*N.Y. Lab. Law § 740* and *N.Y. Lab. Law § 741*).
- Violations of the following statutes:
 - the New York State Worker Adjustment and Retraining Notification Act (WARN), which requires employers to give employees notice of a planned mass layoff, employment loss or relocation (*N.Y. Lab. Law §§ 860 to 860-l*);

- Article 6 of the New York Labor Law, which regulates the payment of wages and prohibits employers from discriminating in wages based on sex (*N.Y. Lab. Law §§ 190 to 199-A*);
- the New York Nondiscrimination for Legal Actions Law (NLAL), which prohibits employers from discriminating against or refusing to employ anyone based on legal recreational activities enjoyed outside of work hours (*N.Y. Lab. Law § 201-d*);
- Section 125 of the New York Workers' Compensation Law, which prohibits employers from discriminating or retaliating against employees for filing workers' compensation claims (*N.Y. Workers' Comp. Law § 125*); and
- Article 4 of the New York Civil Rights Law, which grants all persons equal protection of the laws and prohibits discrimination on the basis of race, creed, color, national origin, sex, marital status, sexual orientation and disability (*N.Y. Civ. Rights Law §§ 40 to 45*).

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.

Including a non-waivable claim in a release generally will not void the entire release, especially where a proper severability clause is in place. However, the following employment-based claims may not be released.

CLAIMS UNDER NEW YORK MILITARY LAW

Waivers of claims under New York Military Law are not valid. New York Military Law prohibits employers from:

- Discriminating against or refusing to employ persons subject to military duty.
- Asking anyone to waive these rights.

Any person who knowingly violates the law is guilty of a misdemeanor punishable by a fine up to \$1,000, imprisonment up to one year or both, and a civil penalty up to \$5,000.

(*N.Y. Mil. Law § 318*.)

PREVAILING WAGE CLAIMS FOR PUBLIC WORK PROJECTS

Employees working under contracts with New York and its agencies or local government entities must be paid the prevailing wage (*N.Y. Lab. Law §§ 220 to 224*). New York courts have held that releases between an employer and persons employed on these projects will not be enforced against further claims that the employer did not pay prevailing wages (see *John F. Cadwallader, Inc. v. New York State Dep't of Labor*, 112 A.D.2d 577 (*N.Y. App. Div. 3d Dep't 1985*)).

UNEMPLOYMENT COMPENSATION CLAIMS

Waivers of unemployment benefit rights under the New York Unemployment Insurance Law are not valid (see *N.Y. Lab. Law § 595* and *In re Green*, 37 N.Y.2d 554 (1975)).

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.

WORKERS' COMPENSATION CLAIMS

Workers' compensation claims may not be released or waived unless the employer and employee follow a prescribed settlement process. A release agreement executed after an employee has filed a workers' compensation claim is valid if the release has been approved by the New York State Workers' Compensation Board (*N.Y. Workers' Comp. Law § 32*).

The release agreement must include information or be on a form prescribed by the chair of the board (*12 N.Y. Comp. Codes R. & Regs. § 300.36(b)*).

The New York State Workers' Compensation Board currently requires:

- Form C-32, a settlement agreement signed by all interested parties.
- Form C-32.1, a Claimant Release signed by the employee submitting the settlement agreement.

The board will approve the release, unless:

- It finds the agreement unfair, unconscionable or improper.
- It finds the agreement is the result of an intentional misrepresentation of material fact.
- Within ten days of the agreement's submission one of the interested parties asks the board to disapprove the agreement.

(*N.Y. Workers' Comp. Law § 32* and *12 N.Y. Comp. Codes R. & Regs. § 300.36(d)*.)

WAIVER OF STATE DISABILITY BENEFITS

Under the New York Disability Benefits Law, most New York employers must provide disability benefits for employees (*N.Y. Workers' Comp. Law § 201* and *N.Y. Workers' Comp. Law § 204*). An employee's agreement to waive his rights to disability benefits is void (*N.Y. Workers' Comp. Law § 218(1)*). However, employees

who are receiving or are entitled to receive old-age benefits under Title II of the Social Security Act may waive or release their disability benefits coverage (*N.Y. Workers' Comp. Law § 235* and *12 N.Y. Comp. Codes R. & Regs. § 359.5*).

The employee must file a statement waiving all benefits under the Disability Benefits Law, including facts that support the waiver, with his employer and with the chairman of the Workers' Compensation Board. The statement filed with the chairman must:

- Include the date when the statement was filed with the employer.
- Be notarized.
- Be signed by the employee.

(*N.Y. Workers' Comp. Law § 235* and *12 N.Y. Comp. Codes R. & Regs. §§ 359.5(a)* and *359.5(b)*.)

For more information on the New York Disability Benefits Law, see *State Q&A Leave Policy Language: New York: Disability Leave Policy* (www.practicallaw.com/5-504-5543). For the text of Sections 300.36 and 359.5 of the New York Codes, Rules and Regulations, see the New York Department of State Division of Administrative Rules.

MINIMUM WAGE AND OVERTIME CLAIMS

The New York Minimum Wage Act provides employees with a private cause of action against an employer who pays them less than the wage to which they are entitled, including overtime (*N.Y. Lab. Law § 663*). However, New York courts have upheld releases of minimum wage and overtime claims in cases where:

- The employee received consideration for signing the release.
- The release complied with all contractual requirements (see *Question 5*).

(See *DeFilippo v. Barclays Capital, Inc.*, *552 F. Supp. 2d 417 (S.D.N.Y. 2008)*, *Hummel v. AstraZeneca LP*, *575 F. Supp. 2d 568 (S.D.N.Y. 2008)* and *Simel v. JP Morgan Chase*, *2007 WL 809689 (S.D.N.Y. Mar. 29, 2007)* (unpublished).)

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.

NEW YORK DEPARTMENT OF LABOR, DIVISION OF LABOR STANDARDS

The Division of Labor Standards at the New York State Department of Labor oversees the administration of the Minimum Wage Act (*N.Y. Lab. Law § 651* and *N.Y. Lab. Law § 652*). The

Minimum Wage Act does not address whether complaints to the Division of Labor Standards may be validly waived in a release of claims agreement. However, New York courts are likely to enforce these waivers (see *Minimum Wage and Overtime Claims*).

NEW YORK DEPARTMENT OF LABOR, UNEMPLOYMENT INSURANCE DIVISION

The Unemployment Insurance Division at the New York State Department of Labor oversees the administration of the Unemployment Insurance Law (*N.Y. Lab. Law § 530*). Complaints made to the Unemployment Insurance Division may not be waived in an agreement (see *Unemployment Compensation Claims*).

NEW YORK STATE WORKERS' COMPENSATION BOARD

The New York State Workers' Compensation Board oversees the administration of the Workers' Compensation Law and the Disability Benefits Law (*N.Y. Workers' Comp. Law § 2*, *N.Y. Workers' Comp. Law § 35*, *N.Y. Workers' Comp. Law § 201* and *N.Y. Workers' Comp. Law § 235*). Complaints for workers' compensation or disability benefits may not be waived unless the parties first submit the waiver agreements to the New York Workers' Compensation Board for approval (see *Workers' Compensation 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.

New York courts analyze the enforceability of releases of employment claims under principles of contract law. Therefore, to be valid, a release must be:

- Clear.
- Unambiguous.
- Knowingly and voluntarily entered into by the parties.

A release is void if a party is:

- Induced to sign it believing that it is not a release.
- Unaware that the document was a release, because of his physical condition and through no fault of his own.
- Subject to coercive acts sufficient to cause a reasonably prudent person faced with no reasonable alternative to sign the release.

(See *Goode v. Drew Bldg. Supply, Inc.*, *266 A.D.2d 925 (N.Y. App. Div. 4th Dep't 1999)*, *American Broadcasting Cos. v. Roberts*, *61 N.Y.2d 244 (1984)* and *Fleming v. Ponziani*, *24 N.Y.2d 105 (1969)*.)

Employers should consistently apprise employees of their rights and give them an opportunity to consult with independent counsel before entering into a release of claims agreement.

STATE CLAIMS 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

Breach of an expressed or implied contract, policy or procedure, wrongful or retaliatory discharge, emotional distress, defamation, slander, libel or false imprisonment, claims for attorneys' fees, back pay, front pay or reinstatement, and any state or local law or ordinance, including, but not limited to, the New York Human Rights Law, the New York Retaliatory Action By Employers Law, the New York Civil Rights Law, the New York Wage-Hour Law, the New York Workers' Compensation Law, the New York Wage Payment Law, the New York City Human Rights Law and harassment, discrimination and retaliation of any kind, or any other cause of action.

Practical Law Company provides practical legal know-how for law firms, law departments and law schools. Our online resources help lawyers practice efficiently, get up to speed quickly and spend more time on the work that matters most. This Article is just one example of the many resources Practical Law Company offers. Discover for yourself what the world's leading law firms and law departments use to enhance their practices.

Contact Us

PRACTICAL LAW COMPANY®



Practical Law Company
747 Third Avenue, 36th Floor
New York, NY 10017
646.562.3405
plcinfo@practicallaw.com
www.practicallaw.com