

**WHAT TO DO ABOUT SEVERANCE PAY AND BENEFITS
DURING REDUCTIONS IN FORCE**

1. Initial Considerations

Nonprofits are facing significant cutbacks in funding. As a result, they are looking to make corresponding reductions in spending. Unfortunately, for many nonprofits the largest single budget item is personnel costs. In order to realize significant savings, these nonprofits are looking at the need to reduce staff.

As an employer, your organization may wish to consider alternatives to a reduction in force (“RIF”), including, for example, hiring or wage increase freezes; reduction in benefits; work furloughs or reduced-hour scheduling; discontinuing the use of temporary or part-time labor; and voluntary separation programs. However, if these are not viable alternatives, your organization may have to implement a RIF.

2. The Worker Adjustment and Retraining Notification Act

Prior to implementing a RIF, you will need to determine if your organization is subject to the Worker Adjustment and Retraining Notification (“WARN”) Act.

The Act requires covered employers to provide notification 60 calendar days in advance of:

- plant closings affecting 50 or more employees,
- layoffs of 50 or more employees if it constitutes 33% or more of the workforce, or
- layoffs of 500 or more employees without regard to percentage of the workforce.

Employment losses are measured over a 30-day period, but the Act is also triggered by employment losses occurring over a 90-day period unless the employer can demonstrate that the employment losses during the 90-day period were the result of separate and distinct actions and causes. Generally, the WARN Act applies to employers with 100 or more employees.¹

¹ In determining the number of employees, the employer is not required to include employees who have worked less than six months in the last 12 months and those who work an average of less than 20 hours a week.

State requirements found in "mini-WARN Acts" are often more rigorous. While neither Virginia nor the District of Columbia currently have such Acts, note that Maryland encourages, but does not require, 90 days notice of plant closings, relocations or reductions in operations which decrease the number of employees by 25% or more, or by 15 employees, whichever is greater, over any three-month period.

3 Provision of Severance Pay and Other Benefits

Once a nonprofit has determined that it will need to reduce its workforce through lay-offs, the next question is what kind of severance payments, if any, it will provide its former employees.

As a general rule, an employee who has been terminated as a result of a reduction in force is eligible for unemployment compensation. However, even if the employee is eligible for unemployment compensation, the nonprofit may still want to provide the employee with additional severance.

Severance pay is generally provided either in a lump sum or in the form of post-termination salary continuation. The amount of severance pay is typically determined by a formula that considers the employee's position and length of service. More senior employees are sometimes provided with greater severance pay because it may take an employee terminated from a higher-paying job longer to find comparable employment.

A typical severance formula gives an employee one or more week's severance

for each year the employee worked for the employer.²

Many employers provide for a minimum severance level, or "floor," and/or a maximum level, or "cap." Both can be expressed in either absolute dollar terms or in months of pay. An employer may also want to formulate different floors or caps for different positions. Moreover, in order to correlate the payments more precisely with the employee's length of service, many employers credit time worked based on partial year increments. (For example, creating a formula that gives credit in three or six month increments rather than a full year.)

A 2005 report stated that the median *minimum* severance for senior and other executives was four weeks, three weeks for professionals, and two weeks for administrative employees.³

If you decide not to structure the severance as a single, lump sum payment, consider making a portion of the severance payment conditional upon whether the individual has obtained alternative employment. For example, an employer could agree to guarantee the

² According to Right Management, top executives in the United States terminated between July and September 2008 earned a mean of 3.04 weeks of severance per year of service, while senior executives earned 2.49, department heads and managers earned 1.78, professional and technical employees earned 1.6, and all other employees received 1.44 weeks.

³ In *HR Magazine*, Betty Sosnin reported that in 2005 the median *maximum* severance for senior executives was 52 weeks, 28 weeks for executives, and 26 weeks for professionals and administrative staff members.

first month of severance pay owed, and offer any additional amount of severance pay due under the plan's formula subject to notice (on a week-to-week or month-to-month basis) from the individual that she or he has not obtained alternate employment.

4. Putting the Terms of the Severance Arrangement in Writing

A federal law, ERISA, requires that covered severance plans be in writing.⁴ ERISA regulates only those benefits whose provisions require ongoing administration. Thus, where severance payments are calculated by using a simple fixed formula triggered by a single event, such as paying a laid-off employee severance based on years of service multiplied by a week of pay, ERISA generally should not apply because there is no ongoing administrative responsibility. However, a more permanent policy which requires an employer to exercise discretion in determining the former employee's ongoing eligibility for severance pay involves continuing administration and therefore would likely be considered an ERISA plan.

In any event, regardless of whether a severance plan is subject to ERISA, the employer should adopt a written program explaining the terms of the severance policy, as it helps ensure the

fair and equitable treatment of similarly-situated employees.

5. Additional Benefits to Laid-Off Employees

Whether or not an employer offers severance pay, the employer may want to offer other benefits to its former employees to assist them while they seek other employment. Some common forms of benefits are:

Extended Health Care Coverage: Provided your nonprofit's plan allows it, your organization may want to offer continuing health and dental insurance for some period of time after the employee's exit. Alternatively, you can continue to pay the employer's share of insurance premiums for those employees who elect to maintain their health coverage under COBRA. (Please also see the information below regarding the government-funded COBRA subsidy.)

Job Counseling and Outplacement Services: Your nonprofit may provide career placement services by contracting with an outside outplacement assistance company to provide a specified number of counseling sessions with the former employee.

Email/Voicemail: Consider offering to put an agreed upon auto-response message on the former employee's business email address and voicemail for one month so that correspondents receive a message with the departing employee's new contact information. Otherwise you could provide the employee with access to these message systems to facilitate his or her job search efforts.

⁴ ERISA requires that the employer file Form 5500 annual reports with the U.S. Department of Labor if there are 100 or more participants. In addition, a summary plan description highlighting the key features of the plan must be provided to all participants. Plans established or maintained by churches are exempt from ERISA.

6. Requiring Employees to Sign a Release

Often times, when an employer pays a former employee severance, the employer wants to be sure that the former employee will not bring any legal claims against the employer. Therefore, offering a severance program that conditions the receipt of all or part of the benefits on the execution of a release by a terminated employee is generally a good idea.

A release states the employee promises not to sue the employer based on any claims arising out of the employment relationship or its termination. Without a release, an employee could accept severance benefits and sue the employer. In structuring the severance pay, keep in mind that the higher the payment levels, the more likely an employee is to sign the release.

Attached to this alert are some sample releases as guidance. Note, however, that these releases are not designed for your particular situation. Your organization should have the form of release reviewed by a lawyer to ensure that it is appropriate for your organization and is legally enforceable.

For an individual 40 years of age or older to release claims under the Age Discrimination in Employment Act (“ADEA”), the release must comply with the requirements of the Older Workers Benefit Protection Act (“OWBPA”), which include the following:

- ✓ The release must be written in a manner the intended reader can understand;
- ✓ The release must refer expressly to the ADEA;
- ✓ The release must cover only claims arising before the release is executed;
- ✓ The release must waive rights or claims only in exchange for consideration in addition to anything of value to which the individual is already entitled (For example, if an employee would otherwise be entitled to severance pay, the employer would have to provide additional benefits to the employee, such as additional severance pay or outplacement services.);
- ✓ The employee must be advised, in writing, to consult an attorney;
- ✓ The employer must provide a period of 21 or 45 days to consider signing the release (The 21 days is for an individual employee and the 45 days is for a termination involving more than one employee, such as a lay-off of two or more employees.);
- ✓ The employer must provide seven days for an employee to revoke his or her acceptance of the agreement following signature; and
- ✓ Where the termination involves more than one employee, the employer must disclose:
 - the group of individuals covered by the involuntary RIF or voluntary program, such as a particular job category or department;

- any of the eligibility requirements and selection criteria for an involuntary RIF or voluntary program, and, for either one, time limits for such program; and
- the ages and job titles of those in the relevant job category or department who are eligible or selected for the RIF or program and those who are not.

7. Advising Laid-Off Employees of Governmental Sources of Support

In addition to any employer provided benefits, the employee is entitled to certain government provided benefits. As a service to former employees, your organization may want to advise them of their eligibility for these benefits:

Unemployment Compensation. An individual may file an unemployment insurance claim in the state in which she or he worked, *not* where the employee lives. The District of Columbia's Unemployment Compensation Program pays weekly benefit amounts ranging from \$50 to \$359, depending on the employee's prior earnings. A laid-off employee is normally eligible for 26 weeks of benefits, however, under the American Recovery and Reinvestment Act of 2009 ("ARRA"), the employee may also qualify for additional emergency benefits.

To qualify for unemployment benefits, terminated employees must meet the wage requirements and engage in certain required conduct, including making at least two job contacts per week,

participating in reemployment services, and registering with the Job Service.

Under the unemployment compensation program, if severance pay is made in installments, individuals will generally be ineligible for the period for which such payments are made. If severance pay is made in a lump sum but attributable to a specified period of time, an individual is generally ineligible for that specific period of time. If severance pay is made in a lump sum and not attributable to any specific period of time, individuals will generally be ineligible for the week in which the lump sum payment is made.

The Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"). COBRA provides employees, spouses, former spouses and dependent children the right to elect temporary (for 18 or, under certain circumstances, 36 months) continuation of health coverage at group rates upon the occurrence of certain qualifying events, including termination of employment. Under normal circumstances, the employee will pay the entire premium amount, which includes the amount he or she paid as an employee in addition to the amount the employer contributed. There may also be a two percent administrative fee.

The ARRA provides for premium reductions and additional election opportunities for health benefits under COBRA and state "mini-COBRA" statutes. Eligible individuals generally include employees whose employment is involuntarily terminated (other than due to gross misconduct) between September 1, 2008 and December 31, 2009. Those individuals generally are required to pay only 35 percent of their COBRA

premiums for up to nine months (or, if earlier, upon eligibility under another employer's health plan). The federal government "pays" the remaining 65 percent of the premiums through a credit to the employer against its payroll tax liability.

Group health plans for employers with 20 or more employees are subject to COBRA.⁵ However, some states have adopted "mini-COBRA" which may differ in duration, eligibility and restrictions from federal law. For example, Maryland requires small employers (two to 19 employees) to provide 18 months of coverage, and Virginia requires small employers (2 to 19 employees) to provide nine months of coverage to employees involuntarily terminated between September 1, 2008 and December 31, 2009.

The District of Columbia generally requires small employers (two to 19 employees) to offer COBRA-like coverage to their departing employees for a period of three months unless they were terminated due to gross misconduct. However, because of the passage of the ARRA, the DC Council amended the District's "mini-COBRA" law in March 2009 to allow employees involuntarily terminated between September 1, 2008 and December 31, 2009 to receive the full nine months of subsidized benefits.

⁵ For purposes of COBRA, an employer will be treated as having 20 or more employees if it employs 20 or more employees on more than 50 percent of its typical business days in the previous calendar year.

Dislocated Workers Programs. The District of Columbia Department of Employment Services ("DOES") offers training and retraining services as well as job placement assistance in the form of individually tailored counseling on strategies and methods for the job search. "One-Stop Career Centers" located throughout the city provide information on these and additional services. Locations and other contact information are accessible at www.does.dc.gov. Click on "One Stop Career Centers."

Additional Resources

You may find the following information helpful:

U.S. Employees Earn Least Amount of Severance Pay Worldwide available at www.hr.cch.com.

Betty Sosnin, *The Numbers on Severance*, HRMAGAZINE, Nov. 1, 2005.

This communication is provided by the D.C. Bar Pro Bono Program and Gibson Dunn & Crutcher LLP as a public service solely for informational purposes, without any representation that it is accurate or complete. It does not constitute legal advice and should not be construed as such. It does not create an attorney-client relationship between the recipient and any other person, or an offer to create such a relationship. This communication contains information that is based, in whole or in part, on the laws of the District of Columbia and is current as of the date it is written. However laws vary from state to state and may change from time to time. As a result, the information may not be appropriate for anyone operating outside the District of Columbia and may no longer be timely. Consult an attorney if you have questions regarding the contents of this communication.

AGREEMENT AND RELEASE

IT IS HEREBY AGREED by and between [INSERT NAME] ("Employee") and [INSERT COMPANY] ("Employer"), for the good and sufficient consideration set forth below, as follows:

1. Employee's employment with Employer will terminate effective [INSERT DATE] (the "date of separation"). Subject to Employee's compliance with this Agreement and Release, Employer agrees to provide Employee with salary continuation at Employee's current salary rate, minus applicable withholdings and deductions, from the date following the date of separation through and including [INSERT DATE] (a total of XX weeks), and [describe any other benefits].

Employee's benefits will be governed by applicable plan terms. (Employee may elect to continue health insurance coverage, following the date of separation at Employee's own expense in accordance with the provisions of COBRA regardless of whether Employee enters into this Agreement and Release.)

2. In return for Employer's agreement to provide Employee with the consideration referred to in Paragraph 1, Employee, for Employee and Employee's heirs, beneficiaries, devisees, privies, executors, administrators, attorneys, representatives, and agents, and Employee's and their assigns, successors and predecessors, hereby releases and forever discharges Employer and its parents, subsidiaries and affiliates, its and their officers, directors, employees, members, agents, attorneys and representatives, and the predecessors, successors and assigns of each of the foregoing (collectively, the "Released Parties") from any and all actions, causes of action, suits, debts, claims, complaints, charges, contracts, controversies, agreements, promises, damages, counterclaims, cross-claims, claims for contribution and/or indemnity, claims for costs and/or attorneys' fees, judgments and demands whatsoever, in law or equity, known or unknown, Employee ever had, now has, or may have against the Released Parties as of the date of Employee's signing of this Agreement and Release. This release includes, but is not limited to, any claims alleging breach of express or implied contract, wrongful discharge, constructive discharge, breach of an implied covenant of good faith and fair dealing, negligent or intentional infliction of emotional distress, negligent supervision or retention, violation of the Civil Rights Act of 1866, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the District of Columbia Human Rights Act, claims pursuant to any other federal, state or local law regarding discrimination, harassment or retaliation based on race, sex, religion, national origin, marital status, disability, sexual orientation or any other unlawful basis or protected status or activity, and claims for alleged violation of any other local, state or federal law, regulation, ordinance, public policy or common-law duty having any bearing whatsoever upon the terms and conditions of, and/or the cessation of Employee's employment with and by Employer. This release does not include claims that may not be released under applicable law.

3. This Agreement and Release is not intended to interfere with Employee's exercise of any protected, nonwaivable right, including Employee's right to file a charge

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with the Equal Employment Opportunity Commission or other government agency. By entering into this Agreement and Release, however, Employee acknowledges that the consideration set forth herein is in full satisfaction and is inclusive of any and all amounts, including but not limited to attorneys' fees, to which Employee might be entitled or which may be claimed by Employee or on Employee's behalf against the Released Parties and Employee is forever discharging the Released Parties from any liability to Employee for any acts or omissions occurring on or before the date of Employee's signing of this Agreement and Release.

4. Neither this Agreement and Release, nor anything contained herein, shall be construed as an admission by the Released Parties of any liability or unlawful conduct whatsoever. The parties hereto agree and understand that the consideration set forth in Paragraph 1 is in excess of that which Employer is obligated to provide to Employee, and that it is provided solely in consideration of Employee's execution of this Agreement and Release. Employer and Employee agree that the consideration set forth in Paragraph 1 is sufficient consideration for the release being given by Employee in Paragraphs 2 and 3, and for Employee's other promises herein.

5. Employee will direct all requests for references to Employer's Human Resources Department, which will confirm Employee's job title, dates of employment and Employee's salary.

6. Employee agrees and promises not to disclose, either directly or indirectly, in any manner whatsoever, any information regarding the existence or terms of this Agreement and Release, to any person or entity, except to members of Employee's immediate family, Employee's attorney and Employee's accountant and/or financial advisor, provided that such persons agree to keep this information confidential, and except as may be required by law.

7. Employee agrees not to use, disclose to others, or permit anyone access to any of Employer's trade secrets or confidential or proprietary information without Employer's express consent, and to return immediately to Employer all Employer property upon termination of Employee's employment. Employee shall not retain any copy or other reproduction whatsoever of any Employer property after the termination of Employee's employment. Employee will also comply with the [INSERT ANY PRIOR NONDISCLOSURE, ETC AGREEMENT] executed by Employee on [INSERT DATE]-[if no agreement, delete this sentence].

8. Each party shall bear its own costs and attorneys' fees, if any, incurred in connection with this Agreement and Release.

9. This Agreement and Release contains the full agreement of the parties and may not be modified, altered, changed or terminated except upon the express prior written consent of Employer and Employee or their authorized agents.

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10. Employee acknowledges and agrees that: (a) no promise or inducement for this Agreement and Release has been made except as set forth in this Agreement and Release; (b) this Agreement and Release is executed by Employee without reliance upon any statement or representation by Employer except as set forth herein; (c) Employee is legally competent to execute this Agreement and Release and to accept full responsibility therefore; (d) Employee has been given 21 days within which to consider this Agreement and Release; (e) Employee has used all or as much of that 21 day period as Employee deemed necessary to consider fully this Agreement and Release and, if Employee has not used the entire 21 day period, Employee waives that period not used; (f) Employee has read and fully understands the meaning of each provision of this Agreement and Release; (g) Employer has advised Employee to consult with an attorney concerning this Agreement and Release; (h) Employee freely and voluntarily enters into this Agreement and Release; and (i) no fact, evidence, event, or transaction currently unknown to Employee but which may hereafter become known to Employee shall affect in any manner the final and unconditional nature of the release stated above.

11. This Agreement and Release shall be governed by and construed in accordance with the laws of the District of Columbia.

12. The waiver by any party of a breach of any provision herein shall not operate or be construed as a waiver of any subsequent breach by any party.

13. The provisions of this agreement are severable. Should any provision herein be declared invalid by a court of competent jurisdiction, the remainder of the agreement will continue in force, and the parties agree to renegotiate the invalidated provision in good faith to accomplish its objective to the extent permitted by law.

14. This Agreement and Release may be signed in counterparts, and each counterpart shall be considered an original agreement for all purposes.

IN WITNESS WHEREOF, the parties have hereunto set their hands.

[INSERT NAME]

For [INSERT COMPANY]

Date

Date

SAMPLE RELEASE: INDIVIDUAL TERMINATION, 40 AND OVER

AGREEMENT AND RELEASE

IT IS HEREBY AGREED by and between [INSERT NAME] ("Employee") and [INSERT COMPANY] ("Employer"), for the good and sufficient consideration set forth below, as follows:

1. Employee's employment with Employer will terminate effective [INSERT DATE] (the "date of separation"). Subject to Employee's compliance with this Agreement and Release, Employer agrees to provide Employee with salary continuation at Employee's current salary rate, minus applicable withholdings and deductions, from the date following the date of separation through and including [INSERT DATE] (a total of XX weeks), and [describe any other benefits].

Employee's benefits will be governed by applicable plan terms. (Employee may elect to continue health insurance coverage, following the date of separation at Employee's own expense in accordance with the provisions of COBRA regardless of whether Employee enters into this Agreement and Release.)

2. In return for Employer's agreement to provide Employee with the consideration referred to in Paragraph 1, Employee, for Employee and Employee's heirs, beneficiaries, devisees, privies, executors, administrators, attorneys, representatives, and agents, and Employee's and their assigns, successors and predecessors, hereby releases and forever discharges Employer and its parents, subsidiaries and affiliates, its and their officers, directors, employees, members, agents, attorneys and representatives, and the predecessors, successors and assigns of each of the foregoing (collectively, the "Released Parties") from any and all actions, causes of action, suits, debts, claims, complaints, charges, contracts, controversies, agreements, promises, damages, counterclaims, cross-claims, claims for contribution and/or indemnity, claims for costs and/or attorneys' fees, judgments and demands whatsoever, in law or equity, known or unknown, Employee ever had, now has, or may have against the Released Parties as of the date of Employee's signing of this Agreement and Release. This release includes, but is not limited to, any claims alleging breach of express or implied contract, wrongful discharge, constructive discharge, breach of an implied covenant of good faith and fair dealing, negligent or intentional infliction of emotional distress, negligent supervision or retention, violation of the Age Discrimination in Employment Act, the Civil Rights Act of 1866, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the District of Columbia Human Rights Act, claims pursuant to any other federal, state or local law regarding discrimination, harassment or retaliation based on age, race, sex, religion, national origin, marital status, disability, sexual orientation or any other unlawful basis or protected status or activity, and claims for alleged violation of any other local, state or federal law, regulation, ordinance, public policy or common-law duty having any bearing whatsoever upon the terms and conditions of, and/or the cessation of Employee's employment with and by Employer. This release does not include claims that may not be released under applicable law.

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3. This Agreement and Release is not intended to interfere with Employee's exercise of any protected, nonwaivable right, including Employee's right to file a charge with the Equal Employment Opportunity Commission or other government agency. By entering into this Agreement and Release, however, Employee acknowledges that the consideration set forth herein is in full satisfaction and is inclusive of any and all amounts, including but not limited to attorneys' fees, to which Employee might be entitled or which may be claimed by Employee or on Employee's behalf against the Released Parties and Employee is forever discharging the Released Parties from any liability to Employee for any acts or omissions occurring on or before the date of Employee's signing of this Agreement and Release.

4. Neither this Agreement and Release, nor anything contained herein, shall be construed as an admission by the Released Parties of any liability or unlawful conduct whatsoever. The parties hereto agree and understand that the consideration set forth in Paragraph 1 is in excess of that which Employer is obligated to provide to Employee, and that it is provided solely in consideration of Employee's execution of this Agreement and Release. Employer and Employee agree that the consideration set forth in Paragraph 1 is sufficient consideration for the release being given by Employee in Paragraphs 2 and 3, and for Employee's other promises herein.

5. Employee will direct all requests for references to Employer's Human Resources Department, which will confirm Employee's job title, dates of employment and Employee's salary.

6. Employee agrees and promises not to disclose, either directly or indirectly, in any manner whatsoever, any information regarding the existence or terms of this Agreement and Release, to any person or entity, except to members of Employee's immediate family, Employee's attorney and Employee's accountant and/or financial advisor, provided that such persons agree to keep this information confidential, and except as may be required by law.

7. Employee agrees not to use, disclose to others, or permit anyone access to any of Employer's trade secrets or confidential or proprietary information without Employer's express consent, and to return immediately to Employer all Employer property upon termination of Employee's employment. Employee shall not retain any copy or other reproduction whatsoever of any Employer property after the termination of Employee's employment. Employee will also comply with the [INSERT ANY PRIOR NONDISCLOSURE, ETC AGREEMENT] executed by Employee on [INSERT DATE]-[if no agreement, delete this sentence].

8. Each party shall bear its own costs and attorneys' fees, if any, incurred in connection with this Agreement and Release.

9. This Agreement and Release contains the full agreement of the parties and may not be modified, altered, changed or terminated except upon the express prior written consent of Employer and Employee or their authorized agents.

10. Employee acknowledges and agrees that: (a) no promise or inducement for this Agreement and Release has been made except as set forth in this Agreement and Release; (b) this Agreement and Release is executed by Employee without reliance upon any statement or representation by Employer except as set forth herein; (c) Employee is legally competent to execute this Agreement and Release and to accept full responsibility therefore; (d) Employee has been given 21 days within which to consider this Agreement and Release; (e) Employee has used all or as much of that 21 day period as Employee deemed necessary to consider fully this Agreement and Release and, if Employee has not used the entire 21 day period, Employee waives that period not used; (f) Employee has read and fully understands the meaning of each provision of this Agreement and Release; (g) Employer has advised Employee to consult with an attorney concerning this Agreement and Release; (h) Employee freely and voluntarily enters into this Agreement and Release; and (i) no fact, evidence, event, or transaction currently unknown to Employee but which may hereafter become known to Employee shall affect in any manner the final and unconditional nature of the release stated above.

11. This Agreement and Release shall become effective and enforceable on the eighth day following execution hereof by Employee unless Employee revokes it by so advising Employer in writing received by [INSERT name, title, and address] before the end of the seventh day after its execution by Employee.

12. This Agreement and Release shall be governed by and construed in accordance with the laws of the District of Columbia.

13. The waiver by any party of a breach of any provision herein shall not operate or be construed as a waiver of any subsequent breach by any party.

14. The provisions of this agreement are severable. Should any provision herein be declared invalid by a court of competent jurisdiction, the remainder of the agreement will continue in force, and the parties agree to renegotiate the invalidated provision in good faith to accomplish its objective to the extent permitted by law.

15. This Agreement and Release may be signed in counterparts, and each counterpart shall be considered an original agreement for all purposes.

IN WITNESS WHEREOF, the parties have hereunto set their hands.

[INSERT NAME]

For [INSERT COMPANY]

Date

Date

SAMPLE RELEASE: "GROUP" (more than one) TERMINATION, 40 AND OVER

AGREEMENT AND RELEASE

IT IS HEREBY AGREED by and between [INSERT NAME] ("Employee") and [INSERT COMPANY] ("Employer"), for the good and sufficient consideration set forth below, as follows:

1. Employee's employment with Employer will terminate effective [INSERT DATE] (the "date of separation"). Subject to Employee's compliance with this Agreement and Release, Employer agrees to provide Employee with salary continuation at Employee's current salary rate, minus applicable withholdings and deductions, from the date following the date of separation through and including [INSERT DATE] (a total of XX weeks), and [describe any other benefits].

Employee's benefits will be governed by applicable plan terms. (Employee may elect to continue health insurance coverage, following the date of separation at Employee's own expense in accordance with the provisions of COBRA regardless of whether Employee enters into this Agreement and Release.)

2. In return for Employer's agreement to provide Employee with the consideration referred to in Paragraph 1, Employee, for Employee and Employee's heirs, beneficiaries, devisees, privies, executors, administrators, attorneys, representatives, and agents, and Employee's and their assigns, successors and predecessors, hereby releases and forever discharges Employer and its parents, subsidiaries and affiliates, its and their officers, directors, employees, members, agents, attorneys and representatives, and the predecessors, successors and assigns of each of the foregoing (collectively, the "Released Parties") from any and all actions, causes of action, suits, debts, claims, complaints, charges, contracts, controversies, agreements, promises, damages, counterclaims, cross-claims, claims for contribution and/or indemnity, claims for costs and/or attorneys' fees, judgments and demands whatsoever, in law or equity, known or unknown, Employee ever had, now has, or may have against the Released Parties as of the date of Employee's signing of this Agreement and Release. This release includes, but is not limited to, any claims alleging breach of express or implied contract, wrongful discharge, constructive discharge, breach of an implied covenant of good faith and fair dealing, negligent or intentional infliction of emotional distress, negligent supervision or retention, violation of the Age Discrimination in Employment Act, the Civil Rights Act of 1866, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the District of Columbia Human Rights Act, claims pursuant to any other federal, state or local law regarding discrimination, harassment or retaliation based on age, race, sex, religion, national origin, marital status, disability, sexual orientation or any other unlawful basis or protected status or activity, and claims for alleged violation of any other local, state or federal law, regulation, ordinance, public policy or common-law duty having any bearing whatsoever upon the terms and conditions of, and/or the cessation of Employee's employment with and by Employer. This release does not include claims that may not be released under applicable law.

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3. This Agreement and Release is not intended to interfere with Employee's exercise of any protected, nonwaivable right, including Employee's right to file a charge with the Equal Employment Opportunity Commission or other government agency. By entering into this Agreement and Release, however, Employee acknowledges that the consideration set forth herein is in full satisfaction and is inclusive of any and all amounts, including but not limited to attorneys' fees, to which Employee might be entitled or which may be claimed by Employee or on Employee's behalf against the Released Parties and Employee is forever discharging the Released Parties from any liability to Employee for any acts or omissions occurring on or before the date of Employee's signing of this Agreement and Release.

4. Neither this Agreement and Release, nor anything contained herein, shall be construed as an admission by the Released Parties of any liability or unlawful conduct whatsoever. The parties hereto agree and understand that the consideration set forth in Paragraph 1 is in excess of that which Employer is obligated to provide to Employee, and that it is provided solely in consideration of Employee's execution of this Agreement and Release. Employer and Employee agree that the consideration set forth in Paragraph 1 is sufficient consideration for the release being given by Employee in Paragraphs 2 and 3, and for Employee's other promises herein.

5. Employee will direct all requests for references to Employer's Human Resources Department, which will confirm Employee's job title, dates of employment and Employee's salary.

6. Employee agrees and promises not to disclose, either directly or indirectly, in any manner whatsoever, any information regarding the existence or terms of this Agreement and Release, to any person or entity, except to members of Employee's immediate family, Employee's attorney and Employee's accountant and/or financial advisor, provided that such persons agree to keep this information confidential, and except as may be required by law.

7. Employee agrees not to use, disclose to others, or permit anyone access to any of Employer's trade secrets or confidential or proprietary information without Employer's express consent, and to return immediately to Employer all Employer property upon termination of Employee's employment. Employee shall not retain any copy or other reproduction whatsoever of any Employer property after the termination of Employee's employment. Employee will also comply with the [INSERT ANY PRIOR NONDISCLOSURE, ETC AGREEMENT] executed by Employee on [INSERT DATE]-[if no agreement, delete this sentence].

8. Each party shall bear its own costs and attorneys' fees, if any, incurred in connection with this Agreement and Release.

9. This Agreement and Release contains the full agreement of the parties and may not be modified, altered, changed or terminated except upon the express prior written consent of Employer and Employee or their authorized agents.

September 2009

10. Employee acknowledges and agrees that: (a) no promise or inducement for this Agreement and Release has been made except as set forth in this Agreement and Release; (b) this Agreement and Release is executed by Employee without reliance upon any statement or representation by Employer except as set forth herein; (c) Employee is legally competent to execute this Agreement and Release and to accept full responsibility therefore; (d) Employee has been given 45 days within which to consider this Agreement and Release; (e) Employee has used all or as much of that 45 day period as Employee deemed necessary to consider fully this Agreement and Release and, if Employee has not used the entire 45 day period, Employee waives that period not used; (f) Employee has read and fully understands the meaning of each provision of this Agreement and Release; (g) Employer has advised Employee to consult with an attorney concerning this Agreement and Release; (h) Employee freely and voluntarily enters into this Agreement and Release; and (i) no fact, evidence, event, or transaction currently unknown to Employee but which may hereafter become known to Employee shall affect in any manner the final and unconditional nature of the release stated above.

11. Employee acknowledges that Employee has been provided with the following information in writing on Exhibit A hereto: (a) any class, unit, or group of individuals covered by this employment termination program, any eligibility factors for this program, and any time limits applicable to the program; and (b) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

12. This Agreement and Release shall become effective and enforceable on the eighth day following execution hereof by Employee unless Employee revokes it by so advising Employer in writing received by [INSERT name, title, and address] before the end of the seventh day after its execution by Employee.

13. This Agreement and Release shall be governed by and construed in accordance with the laws of the District of Columbia.

14. The waiver by any party of a breach of any provision herein shall not operate or be construed as a waiver of any subsequent breach by any party.

15. The provisions of this agreement are severable. Should any provision herein be declared invalid by a court of competent jurisdiction, the remainder of the agreement will continue in force, and the parties agree to renegotiate the invalidated provision in good faith to accomplish its objective to the extent permitted by law.

16. This Agreement and Release may be signed in counterparts, and each counterpart shall be considered an original agreement for all purposes.

IN WITNESS WHEREOF, the parties have hereunto set their hands.

September 2009

[INSERT NAME]

For [INSERT COMPANY]

Date

Date

EXHIBIT A
DISCLOSURES PURSUANT TO
THE OLDER WORKERS BENEFIT PROTECTION ACT

[INSERT DESCRIPTION OF ANY CLASS, UNIT, OR GROUP OF INDIVIDUALS COVERED BY THIS EMPLOYMENT TERMINATION PROGRAM, ANY ELIGIBILITY FACTORS FOR THIS PROGRAM, AND ANY TIME LIMITS APPLICABLE TO THE PROGRAM.]

Titles and Ages of Employees Selected for Job Elimination

[INSERT TITLE]	[INSERT AGE]
[INSERT TITLE]	[INSERT AGE]

Titles and Ages of Employees Not Selected for Job Elimination

[INSERT TITLE]	[INSERT AGE]
[INSERT TITLE]	[INSERT AGE]