

**Breaking Up Is Hard to Do:
Separation Agreements**

Breaking Up Is Hard To Do: Separation Agreements

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***“Life
is all
about
relationships”***

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Unsatisfactory Performance

Is the employee’s failure to perform because:

- Unreliable
- Undependable
- Insubordinate
- Incapable

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***Toussaint v Blue
Cross & Blue
Shield***

408
Mich
579

(1980)

- Unsatisfactory performance can be cause to discharge an employee.
- Employer has the right to establish a variety of standards for assessing the quality of employee performance.
- Possible that a jury might determine that the unsatisfactory performance is a pretext.

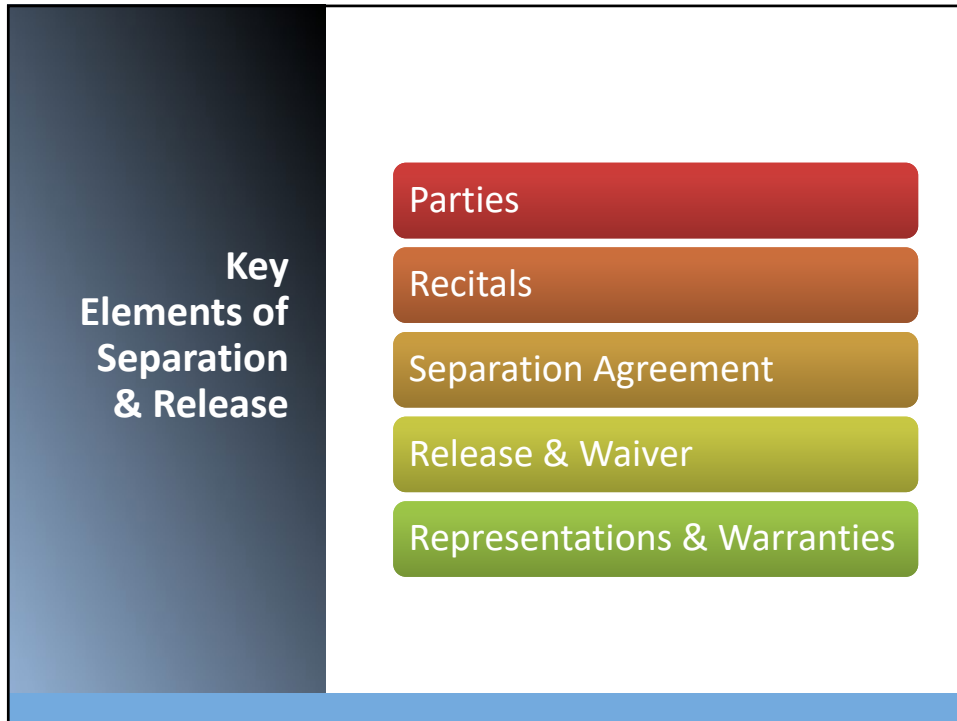
5

7 Factors of Just Cause

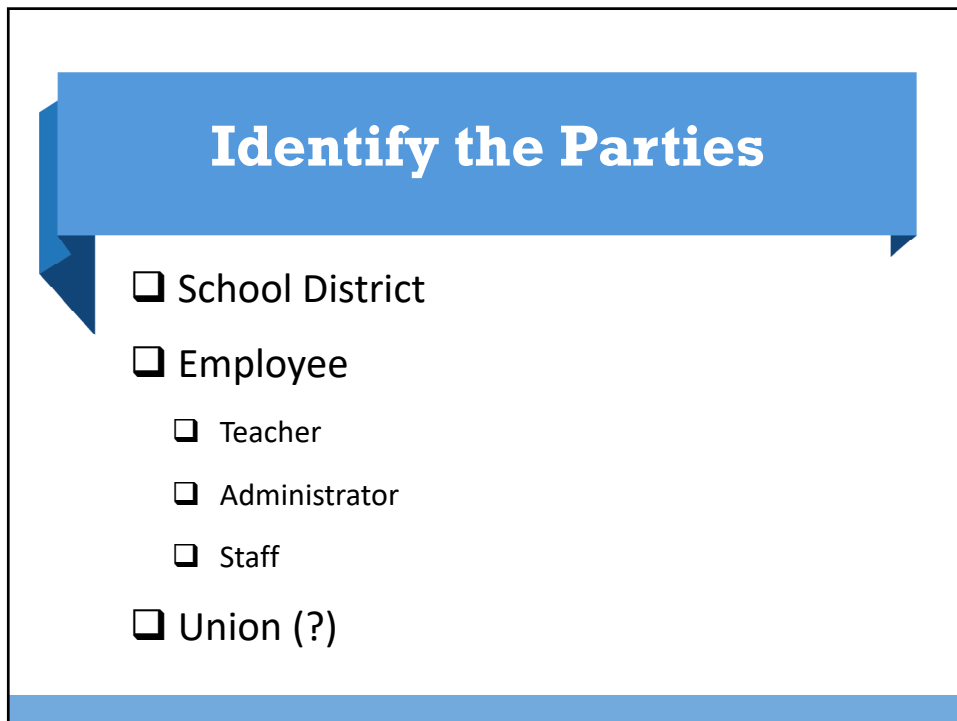
1. Prior Notice
2. Reasonable Rule or Order
3. Fair Investigation
4. Due Process
5. Substantial Evidence
6. Equal Treatment
7. Fair Penalty/Treatment

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Provide Recitals

- Best interests to end the employment relationship
- Employee wishes to voluntarily resign position
- If lawsuit filed, state parties wish to resolve that dispute fairly and equitably

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Separation Agreement

- Voluntary Resignation
- Consideration
- Severance Pay
- Benefits
- Vacation/PTO
- Insurance/COBRA

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**Breaking Up Is Hard to Do:
Separation Agreements**

Separation Agreement

- Return of Property
- Letter of Reference
- Reemployment
- Non-Admission
- Non-Disparagement
- Confidentiality

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Voluntary Resignation

Employee shall execute a voluntary resignation of employment with the District, effective DATE. It is expressly understood and agreed that this Agreement and Employee's voluntary resignation shall constitute a permanent relinquishment of employment with the District in any and all capacities, and that this resignation shall be final and irrevocable upon acceptance by the Superintendent on behalf of the Board.

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Severance Payment

- Payment must be clearly defined
 - State it is subject to withholdings
- Consideration for Release
- Timing of Payment(s)
 - Lump sum payment
 - Multiple payments

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Stefanac v Cranbrook Ed Cmty

435 Mich
155

(1990)

- Generic exchange of consideration not enough.
- Need specific recitations of consideration for the release of claims or covenants not to sue.

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Severance Payment

In consideration of the releases provided by Employee in this Agreement, Employee shall be paid \$ AMOUNT, subject to all applicable tax and other withholdings.

The amount will be paid out in one lump sum on or before DATE.

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Severance Payment - Taxes

The Employee has been instructed to consult with a tax advisor regarding the tax consequences of this Agreement and remains responsible for the Employee's portion of any and all applicable federal, state and local taxes.

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Complete and Final Compensation

Employee acknowledges and accepts the terms of this Agreement and the payments made under its terms as the sole, exclusive, and final compensation to be provided to Employee by the District for the remainder of his/her employment with and separation from the District.

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Complete and Final Compensation, cont.

Additionally, Employee acknowledges that Employee is not entitled to any other compensation, benefits, or separation payments provided under any existing, expired, or successor contract or collective bargaining agreement or due to any other established working condition or policy.

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Address Vacation & PTO

If obligated under an existing contract, specify how any accrued but unused vacation and/or PTO days will be handled

- whether paid out on separation
- if so, at what rate

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Address Insurance Issues

Specify the date that, except for COBRA continuation, all medical, dental, and other benefits will cease

- Note employee's right to elect continued health insurance coverage at employee's expense as provided by COBRA

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COBRA Notice

Following the effective date of the Employee's resignation, Employee shall have and may exercise, at his/her own expense, the COBRA health insurance continuation rights for which he/she is then eligible.

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Require the Return of District Property

- Keys/Access Cards
- Files/Documents
- Credit Cards
- Technology
 - Computers
 - Phones
 - passwords

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Require the Return of District Property

Employee shall promptly return to the Superintendent any and all property (including but not limited to records, documents, computers, keys, phones, passwords to technology, credit cards, and all other property of any kind of description) belonging to the District which is in the Employee's or Employee's agents' possession and/or under their control.

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Consider Letter of Reference

Will you provide a

- Positive letter
- Neutral letter
- Only dates

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Response to Inquiry

If the District receives an information request about Employee from a potential employer, the District will provide the entity with Employee's dates of employment and Employee's most recent performance evaluation rating.

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Address Future Re-Employment

Consider provision that will prevent person from seeking employment with the School District in the future

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Future Re-Employment

Employee agrees to not apply for or accept future employment with the District. Employee further agrees to not work as an independent contractor with the District.

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Provide No Admission of Wrongdoing

- Agreement is to avoid inconvenience and cost of litigation - not an admission of liability.
- Liability for any wrongdoing is expressly denied.

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No Admission of Wrongdoing

The parties' execution of this Agreement does not represent, nor shall it be construed as, an admission of any nature whatsoever regarding any matters arising out of Employee's employment with the District and his/her separation from that employment. Both parties expressly deny any wrongdoing.

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Confidentiality, Non-Disclosure, & Non-Disparagement

- FOIA
- 1230b – Unprofessional Conduct
- First Amendment

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Confidentiality & Non-Disclosure

To the extent permitted by law, the parties agree that this Agreement, and the circumstances leading to this agreement, shall be considered confidential and its terms shall not generally be disclosed. The parties further understand and agree that this Agreement is subject to disclosure under the Michigan Freedom of Information Act and/or other relevant laws, regulations, or policies.

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Non-Disparagement

Employee agrees not to make any disparaging or defamatory statements (written or oral) about the District, its Board, administrators, employees, agents, or representatives. Similarly, on behalf of the District, the District's Superintendent [and central office administrators] agrees[s] that he/she [they] will not make any disparaging, critical, or defamatory statements (written or oral) about Employee.

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Non-Disparagement, cont.

This provision does not restrict either party from providing truthful information in response to lawful subpoenas, government investigations, or legal proceedings, or from making any disclosures required by law.

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Provide Release and Waivers

- Cover all areas of potential liability
- Adequacy of consideration
- Limitation – date of release

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**Breaking Up Is Hard to Do:
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Key Negotiation Factors

- Reasonable opportunity to negotiate
- Adequate consideration
- Reasonable time for employee to
 - review agreement
 - revoke release/waivers

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***Stefanac v
Cranbrook Ed Cmty***

435 Mich
155

(1990)

A release is virtually unenforceable unless employee voluntarily executes it

- No duress or coercion

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<i>Collucci v Eklund</i>	240 Mich App 654	(2000)
<ul style="list-style-type: none">• Adequacy of compensation• Simplicity of release language• Notice of rights relinquished• Opportunity to consult with an attorney or other representative		

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<i>Hungerman v McCord Gasket Corp</i>	189 Mich App 675	(1991)
<p>Most effective way to confirm voluntariness is to grant employee opportunity to have representation in the negotiation and execution of the agreement.</p>		

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Attorney Review

Employee acknowledges that he/she had the opportunity to consult with legal counsel of his/her own choosing prior to executing this Separation and Release Agreement.

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Release: Cover All Potential Liability

- Wrongful/constructive discharge
- Breach of contract
- Constitutional rights, civil rights, and discrimination
- Personal injury, emotional distress, invasion of privacy, defamation, and injury to reputation

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Release

In consideration of the terms of this Agreement, Employee agrees to discharge and release the District (including individual Board members, administrators, employees and/or agents) from any and all claims, complaints, charges, demands, grievances, claims for arbitration, and/or other causes of action (pending or contemplated) of any kind which Employee currently has or may claim to have against any of the above, including:

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Wrongful Discharge & Breach of Contract

Any claim for

- breach of contract,
- wrongful discharge,
- constructive discharge, or
- any similar claims

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Release – Wrongful Discharge & Breach of Contract

- A. Any claim for breach of contract, wrongful discharge, constructive discharge, or any similar claims.
- B. Any kind of contractual, legal or equitable claim arising during and from his/her employment and/or resignation and separation from employment with the District, including (but not limited to) any and all of the circumstances leading to his/her resignation and separation pursuant to the terms of this Agreement.

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Personal Injury & Torts

Any claim for

- personal injury and/or damages of any kind, including those for
 - infliction of emotional or mental distress,
 - invasion of privacy,
 - defamation and/or injury to reputation

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Release ~ Torts

- C. Any claim for personal injury and/or damages of any kind, including but not limited to those for infliction of emotional or mental distress, invasion of privacy, defamation and/or injury to reputation.

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Key Civil Rights Laws

- Title VII of Civil Rights Act of 1964
 - race, color, religion, sex (pregnancy, sexual orientation, gender identity), & national origin
- Age Discrimination in Employment Act (ADEA)
- Americans with Disabilities Act (ADA)

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***Bostock v.
Clayton County***

590 US __

(2020)

- Title VII covers sexual orientation & gender identity.
- Discrimination based on homosexuality or transgender status requires an employer to intentionally treat employees differently because of their sex.

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**Release ~ Constitutional,
Civil Rights, & Statutory Claims**

- D. Any claim for violation of constitutional rights, discrimination (including but not limited to disability, age, sex, religion, race, national origin, veteran status and/or marital status), or any claim which may have arisen under the Federal Civil Rights Acts, the Age Discrimination in Employment Act, the Family Medical Leave Act, the Americans With Disabilities Act, Section 504 of the Vocational Rehabilitation Act, the Michigan Elliott-Larsen Civil Rights Act, and/or the Persons With Disabilities Civil Rights Act, the Michigan Teachers' Tenure Act, and any and all other pertinent state and federal statutes.

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Age Discrimination

- ADEA
 - Protects employee 40 years or older
- OWBPA
 - Must expressly state the ADEA
- Timing
 - 21/45 days to review & 7 days to revoke waiver

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Waiver of Consideration Period

If Employee decides to sign this Agreement prior to the expiration of the twenty-one (21) day period, he/she represents that it is his/her desire to do so, and that he/she had the opportunity to consult with legal counsel of his/her own choosing, and that he/she is not waiving his/her right to consider this Agreement for the entire twenty-one (21) days at the demand, advice, or suggestion of the School District.

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Unemployment

Consider whether

- you will agree to not contest unemployment
- Employee waives unemployment benefits

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No Unemployment

Employee acknowledges and understands that his/her voluntary resignation from employment with the School District precludes his/her application for and receipt of unemployment benefits under the Michigan Employment Security Act, MCL 421.1, *et seq.*, and will be presented to disqualify his/her from receipt of unemployment compensation benefits as evidence of a voluntary termination of employment without cause attributable to the School District should Employee file a claim for unemployment benefits.

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WARNING!
Worker's Compensation

Worker's Compensation Rights

- statutorily protected
- cannot be released, waived, or surrendered

MCL 418.815

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1230b
Unprofessional Conduct

- School District cannot agree to suppress any 1230b unprofessional conduct

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RSC 1230b: Unprofessional Conduct

... shall not enter into a ... resignation agreement, severance agreement, or any other contract or agreement that has the effect of suppressing information about unprofessional conduct of an employee or former employee or of expunging information about that unprofessional conduct from personnel records.

MCL 380.1230b(6)

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1230b Definition of Unprofessional Conduct

"Unprofessional conduct" means 1 or more acts of misconduct; 1 or more acts of immorality, moral turpitude, or inappropriate behavior involving a minor; or commission of a crime involving a minor. A criminal conviction is not an essential element of determining whether or not a particular act constitutes unprofessional conduct.

MCL 380.1230b(8)(a)

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1230b Unprofessional Conduct

If the District receives an information request under Revised School Code Section 1230b about the Employee, the District shall respond “no” to any inquiry as to whether the Employee engaged in unprofessional conduct as that term is defined by Revised School Code Section 1230b while employed by the District.

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EEOC Guidance

Cannot prohibit employees from

- filing charges with the EEOC,
- cooperating, testifying, or participating in agency investigations, even if employee waives right to personal relief

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EEOC Guidance, cont.

Conditioning severance on a waiver that restricts employee from filing charges with the EEOC is viewed as unlawful retaliation.

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EEOC Q&A Waivers (2009)

<https://www.eeoc.gov/laws/guidance/qa-understanding-waivers-discrimination-claims-employee-severance-agreements>

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QUESTIONS



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