

## Warning: Courts Are Closely Scrutinizing Separation Agreements

During the past year, we have been closely monitoring — and growing increasingly concerned about — court decisions from across the country that have invalidated employee releases of claims contained in separation agreements. These recent cases signal a focusing of enforcement efforts by the EEOC and increased court scrutiny of employee releases.

Employers generally do not want to pay money to a terminated employee in exchange for a release of claims if the release will not hold up in court. This edition of the *Employment Law Advisor* discusses recent developments and offers some practical guidance on separation agreements to help ensure that employers do not pay severance in exchange for a defective release.

### Separation Agreements May Not Prohibit the Filing of EEOC (or Other Agency) Charges

Typically, releases contain language whereby the employee waives the right to file any type of claim against the employer. If the employee later sues the employer on a released claim, the employer can use the release as an affirmative defense to dismiss the employee's lawsuit. In comparison, a covenant not to sue is a promise not to file claims against the employer. If the employee sues despite that promise, the employer will have a claim against the employee for breach of contract. Such covenants typically provide that the employee must pay the employer's legal fees and costs in defending against the suit.

Although an employee can waive the right to file court claims seeking to recover money damages and also (based on recent court decisions) probably can waive the right to recover money damages arising from a charge with the Equal Employment Opportunity Commission ("EEOC") (or other federal and state administrative agencies), recent cases hold that any release

Will your company's separation agreement hold up in court or will it be invalidated?

Courts are closely scrutinizing employee releases for language that violates public policy.

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purporting to waive the right to file a charge of discrimination with the EEOC is void as against public policy. (The EEOC and other agencies are charged by law to investigate and eliminate certain practices — such as unlawful discrimination — from the workplace. Thus, these agencies take the position that any release prohibiting an employee from filing a charge effectively interferes with the EEOC's investigative powers.) Moreover, the EEOC (and recently courts) also have taken the position that such releases are "per se" retaliation against the affected employee.

For example, in *EEOC v. Lockheed Martin*, a case decided in federal court in Maryland on August 8, 2006, the EEOC sued to attack an employer's release. In connection with a reduction in force, the employer, Lockheed Martin, presented several employees with a release as part of a severance arrangement. The release explicitly prohibited the filing of a charge with the EEOC. One employee, after receiving the release but before receiving the severance pay, filed a charge with the EEOC alleging race, gender and age discrimination. Lockheed Martin told the employee that she would have to dismiss her EEOC charge before being eligible to receive the severance pay. The federal court ruled that Lockheed had retaliated against the employee because: (1) the release was retaliatory on its face in that it prohibited the filing of a charge with

the EEOC; and (2) Lockheed had told the employee that it would not pay her severance unless the employee withdrew the EEOC charge.

*Lockheed Martin* is only one of several recently reported EEOC attacks on separation agreements. On September 1, 2006, the EEOC and Ventura Foods entered into a consent decree to settle litigation brought by the EEOC, challenging Ventura Foods' practice of offering enhanced severance pay in exchange for employees' agreement not to file a charge with the EEOC.

### Separation Agreements May Not Preclude Cooperation With the EEOC

A separation agreement should not explicitly — or even implicitly — suggest that an employee cannot cooperate with the EEOC (or other federal or state agency) in connection with an investigation. If it does, the employer runs the risk that the separation agreement and release will be void. This problem usually arises in overbroad confidentiality provisions that require the terminated employee to maintain complete confidentiality of the severance arrangements.

## Confusing Separation Agreements May Render Releases Ineffectual Against Age Claims

Many employers are aware of the special rules that apply to releases of age claims under the Older Workers Benefit Protection Act (“OWBPA”). A compliant agreement must include the following provisions (among others): (i) a 21 day consideration period; (ii) a 7 day revocation period; and (iii) advice to consult with an attorney prior to executing the agreement. Otherwise, the release will not be valid to release age claims under federal law. Moreover, in most situations involving the termination of 2 or more employees, special rules apply to release federal age claims, including additional time for consideration (45 days) and detailed informational disclosures. Recent cases reflect that the EEOC and courts are scrutinizing separation agreements very closely for compliance with OWBPA, focusing on the overarching requirement that the release be “knowing and voluntary.”

Because Congress’s purpose in enacting the OWBPA was to protect older workers from being coerced or manipulated into waiving their rights under the Age Discrimination in Employment Act (“ADEA”), the OWBPA specifically addresses waivers of rights and claims under ADEA. The OWBPA expressly provides that waivers may be valid and enforceable under ADEA only if the waiver is “knowing and voluntary.” In order to be “knowing and voluntary,” the waiver must among other things be written in plain language “in a manner calculated to be understood” by an average employee. Short and plain sentences should be used and legal jargon should be eliminated as much as possible. This “knowing and voluntary” requirement provides the greatest danger to employers using form separation agreements that have not been reviewed by counsel very recently (in the past several months). The danger lurks in agreements containing language or provisions that could be viewed as ambiguous, confusing or internally inconsistent. Employees can use such problems to claim that their release was not “knowing and voluntary” because

the agreement was not written “in a manner calculated to be understood” by an average employee.

In *Syverson v. International Business Machines*, a case decided by a federal court of appeals on August 31, 2006, the court ruled that IBM’s release in connection with a severance agreement offered to employees as part of a reduction in force did not release IBM from liability for age discrimination claims later brought by employees (even though they had received severance pay). The problem for IBM, the court said, was that its separation agreement contained a release of claims and a covenant not to sue that appeared to conflict with each other. The release gave up all rights to sue for age discrimination, but the covenant not to sue seemed to carve out claims under the ADEA. The court found that: “the phrasing of the release and covenant not to sue engenders confusion over whether ADEA claims are in fact covered by the release or are excepted from it.” This confusion ran afoul of the OWBPA “knowing and voluntary” requirement because the agreement was not drafted “in a manner calculated to be understood” by an average employee.

### What Should Employers Do (and Not Do)?

Recent cases caution employers to:

- ✔ Consider eliminating the covenant not to sue from separation agreements; or, if both a release and covenant not to sue are used together, explain in the agreement — clearly and unambiguously — how the two provisions dovetail;
- ✔ Consider including language in separation agreements advising employees that they are not giving up any right that cannot be waived by law, including the right to file a charge of discrimination with the EEOC and other federal and state agencies;
- ✔ Carefully draft release language to make clear that the employee is giving up the right to file claims in court seeking monetary damages and giving up the right to recovery monetary damages in an agency proceeding, but not the right to file an administrative charge;
- ✔ Avoid conditioning severance pay on the employee’s waiver of the right to file charges with administrative agencies

(or demanding that an employee withdraw or dismiss a charge in order to receive the severance pay); and,

- ✔ Avoid references to “charges,” “administrative proceedings” and the like in the release language and consider including an explicit statement in the release that the release does not impair the employee’s right to file a charge with the EEOC or state agency.

### Conclusion

Whether to offer a terminated employee a severance package in return for a release of claims depends on a number of employer specific factors, such as employer policy, practice and employee relations philosophy. Generally, providing severance in exchange for a release can be a worthwhile investment, as the amount of severance generally is insignificant compared to the cost of defending an employee claim. Severance agreements also can be effective tools to prevent litigation in the context of layoffs, where there are risks of multiple claims. In light of the very recent court decisions discussed above, however, employers must be very careful — provisions deemed acceptable in the past are now being successfully challenged. Consequently, employers should have their separation agreements reviewed by employment counsel to ensure the agreements will not be invalidated.

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