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Revising Employee Release & Waiver Agreements - Attention to Details Counts

Many employers routinely require terminated employees to sign a general release of any claims against the company as a condition to receiving severance benefits, or to participating in an early retirement program. General releases almost always include a release of any claims under the Age Discrimination in Employment Act ("ADEA"), at least if the employee is age 40 or above. However, a recent ADEA case decided by the U.S. Court of Appeals for Eighth Circuit may require employers to revise the terms of their general release to make sure it is valid under the Older Workers Benefit Protection Act ("OWBPA"), which amended the ADEA.

The case, *Thomforde v. IBM Corporation*, 406 F.3d 500 (8th Cir. 2005), was based on the technical distinction between a "release" and a "covenant not to sue." The first provides the basis for a defense – that the employee has waived his rights under the ADEA. The second is a separate promise by the employee not to sue, breach of which might expose the employee to some form of damages. The court held that while it is legal to require that an employee release ADEA claims to receive severance or early retirement benefits, the employer could not also require the employee to enter into a contract never to file suit under the ADEA. The reason is that if the employee is under a contractual obligation not to file suit, courts could not determine whether the release satisfied the requirements of the OWBPA.

Furthermore, even though the IBM agreement excluded ADEA claims from the covenant not to sue, the court held that because the agreement used technical legal terms and did not clearly explain the difference between a release and a covenant not to sue, it failed to meet the requirement that a waiver agreement be written in a manner calculated to be understood by the employee, and therefore was invalid under the ADEA.

Many release forms routinely include the terms “release” and “covenant not to sue” in their boilerplate provisions as if the two terms were synonymous. The *Thomforde* case illustrates that certain usage of the two terms can result in the entire release being invalidated. Employers who utilize employee release forms should review them carefully so that any covenants not to sue contained therein are properly drafted so as not to violate the ADEA/OWBPA.

If you have any questions concerning whether your separation agreement or other release form satisfies legal requirements, please contact the Seyfarth Shaw LLP attorney with whom you work or any attorney on the website at www.seyfarth.com.



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