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One Minute Memo®

EEOC Issues Employee-Friendly Guidance on Separation Agreements

While economists and others debate whether the economy has turned a corner, reductions-in-force remain frequent in the U.S. (and global) economy. Most U.S. employers continue to offer downsized employees severance benefits in exchange for a release of claims. Recognizing this, the U.S. Equal Employment Opportunity Commission (EEOC) issued new guidance on July 15, 2009 titled *Understanding Waivers of Discrimination Claims in Employee Severance Agreements*.

In form, EEOC's new *Severance Agreement* guidance is unusual in that it is directed to employees in a Q&A format. For example: "If your employer decides to terminate you, it may give you a severance agreement similar to the one that follows . . ." In substance, however, the guidance is mostly unsurprising in that it simply restates the statutory requirements for individual and group waivers under the Age Discrimination in Employment Act (ADEA), as amended by the Older Workers Benefit Protection Act (OWBPA).

Although written in an especially employee-friendly format, even for EEOC, the guidance serves as a useful compliance tool for employers. For example, EEOC emphasizes that a general release cannot include a waiver of rights to file a charge with EEOC or participate in an agency investigation. Similarly, the guidance states that a release cannot merely acknowledge that the employee has had sufficient time to consult with counsel; rather, the employee must be "*advised* to consult with an attorney" by the separation agreement itself. *See* Example 6 (emphasis by EEOC).

The guidance contains two other noteworthy messages for employers. First, EEOC posits that employers cannot "cure" a defective waiver by later providing OWBPA information omitted from the original agreement—and commensurately restarting OWBPA's 21- or 45-day period. *See* Answer to Question 6 (citing *Butcher v. Gerber Products Co.*, 8 F. Supp. 2d 307 (S.D. N.Y. 1998)). For example, suppose the employer inadvertently omits a page from the ages and job titles disclosure sent to employees as part of a group termination program. According to EEOC, the employer cannot cure this technical defect by sending a corrected list and re-starting the 45-day period, at least not after the employee has signed the agreement. Like the district court in *Butcher*, however, EEOC provides no rationale for this extreme view. Nonetheless, EEOC's position reinforces the need for employers to make sure their OWBPA disclosure is 100% correct in the first instance.

Second, in a surprisingly equivocal stance, EEOC takes no position on whether employers conducting a RIF must disclose selection criteria for the RIF. Several lower courts have ruled this way, citing OWBPA's requirement that employers disclose the "eligibility factors" for a group termination program. The agency cites those decisions, along with its own prior regulations—which say nothing about selection criteria, with no conclusion as to whether those criteria must be disclosed.

One might have expected EEOC to join those lower courts in demanding the additional disclosure. It is conceivable that EEOC, at least for now, has decided selection criteria need not be disclosed, so long as the employer has otherwise complied with OWBPA's prescriptions. Alternatively, EEOC may have decided against imposing an additional disclosure requirement not plainly required by the statute. Or, EEOC may have decided to leave employers wondering about this vexing issue. After all, as noted above, this latest guidance is intended mainly to assist employees.

You can access EEOC's guidance directly at *www.eeoc.gov/policy/docs/qanda_severance-agreements.html*.

For more information, please contact the Seyfarth attorney with whom you usually work, or any Labor and Employment attorney on our website (www.seyfarth.com/LaborandEmployment).

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