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On July 15, 2009, the Equal Employment Opportunity Commission (EEOC) published a document offering guidance to employees who are offered severance agreements as part of a layoff. Although the publication does not change existing regulations or enforcement guidance, it provides insight into the EEOC's position on certain issues related to waivers of employment discrimination claims.

EEOC Issues New Guidance on Severance Agreements

By Kerry E. Notestine and Kelley Edwards

As our country struggles with difficult economic times, many employers have chosen to lay off at least some portion of their workforce. The unemployment rate in the U.S. is nearing 10% in recent months. As a result, the EEOC has seen a rise in both age discrimination charges and requests by employers for laid-off employees to sign waivers of discrimination claims in exchange for severance agreements. The EEOC has recently published a document titled "Understanding Waivers of Discrimination Claims in Employee Severance Agreements." While the publication is directed more toward employees than employers, it offers employers some helpful insight on the positions the EEOC takes towards waivers of discrimination claims included in severance agreements.

This policy document is not an EEOC regulation or even an enforcement guidance, but it summarizes, from the EEOC's perspective, existing legal requirements for severance agreements under the Americans with Disabilities Act (ADA), Title VII, the Equal Pay Act (EPA), and, in particular, the Age Discrimination in Employment Act (ADEA). The publication does not appear to be intended to change existing regulations, but employers should anticipate that the EEOC will refer to the document when investigating charges or pursuing lawsuits that involve releases.

Summary of Requirements for Severance Agreements

The EEOC publication emphasizes the following requirements for severance agreements and releases of discrimination claims:

- 1. The agreement must be supported by consideration.** The EEOC specifies that consideration "must be something of value *in addition* to any of the employee's existing entitlements," such as a lump sum payment of money or periodic payment of the employee's salary for a specified period of time after termination. Payment for vacation benefits to which the employee would otherwise have been entitled upon termination is, for example, inadequate consideration to support a release.

2. **The agreement cannot require the employee to waive future rights.** While the EEOC does not elaborate on this requirement, the document clearly states that severance agreements cannot waive claims arising in the future.
3. **The agreement cannot waive certain existing rights.** Although severance agreements may waive an employee's right to file suit against his employer for prior acts of discrimination or retaliation, the agreement may not restrict an employee's right to file a charge of discrimination with the EEOC. In addition, the agreement cannot limit an employee's right to testify, assist, or participate in an investigation, hearing or other proceeding conducted by the EEOC.
4. **The waiver must be knowing and voluntary.** The publication emphasizes that an employee must knowingly and voluntarily consent to a waiver in a severance agreement or release, but states that the rules for such waivers depend on the particular statute under which suit may be brought. According to the EEOC, most courts will consider the following factors to determine whether the employee knowingly and voluntarily waived her rights under Title VII, the ADA, or the EPA:
 - whether the agreement was written in a manner that was clear and specific enough for the employee to understand;
 - whether it was induced by fraud, duress, undue influence, or other improper conduct by the employer;
 - whether the employee had enough time to read and consider the agreement before signing it;
 - whether the employee consulted with an attorney or was encouraged or discouraged by the employer from doing so;
 - whether the employee had input in negotiating the terms of the agreement; and
 - whether the employer offered the employee consideration that was accepted by the employee.

In addition, the document reaffirms the following requirements applicable to waivers under the ADEA, as amended by the Older Workers Benefit Protection Act (OWBPA), applicable to employees 40 years of age and over:

1. **The waiver must be understandable.** The agreement must be written in plain language geared to the level of comprehension and education of the average individual(s) eligible to participate. In other words, the agreement must be devoid of technical jargon and long, complex sentences, must not be misleading, and must not exaggerate any benefits given or minimize any limitations.
2. **The waiver must specifically reference the ADEA.** Any enforceable waiver must expressly spell out the Age Discrimination in Employment Act (ADEA) by name.
3. **The agreement must advise the employee in writing to consult an attorney.** The EEOC clarifies that it is insufficient for an agreement to suggest that an employee consult with her legal representative. Instead, the release must specifically advise the employee to seek the advice of an attorney.
4. **The employee must have 21 (or 45) days to consider the offer.** An employer must give the employee 21 days from the date of the employer's final offer to consider the release, or 45 days in the case of a group termination.
5. **The employer must allow a seven-day revocation period.** Employees must be given the right to revoke an age discrimination waiver for seven days following execution of the agreement. This seven-day period cannot be changed or waived by either party for any reason.
6. **The waiver must not include future rights.** An agreement cannot waive an employee's rights regarding acts of discrimination that occur after the date of signing.
7. **The waiver must be supported by adequate consideration.** As explained above, a valid waiver under the ADEA must be in exchange for something of value to which the employee is not already entitled.

8. Additional requirements for “Group Layoffs.” The publication also reaffirms the additional OWBPA requirements for “exit incentives” or “other employment termination programs” offered to a group or class of employees.

- **The consideration period must be 45 days.**
- **The employer must give certain written disclosures.** Specifically, the employer must inform employees in writing of the “decisional unit” – the class or group of employees from which the employer chose the laid off employees, the “eligibility factors” for the program, applicable “time limits,” and the “job titles and ages of all individuals” eligible or selected, and not eligible or not selected, for the program.

The document also states that the above requirements are the *minimum* required for a valid age discrimination release. A release may still be invalidated if an employer uses fraud, undue influence, or other improper conduct to coerce the employee to sign it, or if it contains a material mistake, omission, or misstatement. The document also reaffirms the indication in applicable regulations that employers may not “renege” on promises contained in a release or impose other penalties after an employee had filed a lawsuit challenging the validity of a waiver.

Questions Raised by the Publication

While the guidance should be viewed as a resource for employers offering severance agreements to its terminated employees, it is also important to note that the EEOC takes some questionable positions in its publication.

First, the publication takes certain expansive views of potential waiver or release issues. For example, the document states that “any provision” that attempts to limit an employee’s right to file a charge or participate in an EEOC investigation is “invalid and unenforceable.” In making this assertion, the EEOC does not specify whether the inclusion of such a provision invalidates that particular clause or whether it renders the entire agreement unenforceable.

Second, the document raises some questions about an employer’s rights when modifying a severance agreement after it is issued. The EEOC presents an aggressive view regarding an employer’s inability to correct a waiver or release agreement that fails to adequately comply with the OWBPA. The document cites to the district court case of *Butcher v. Gerber Products Co.*¹ for the proposition that “an employer is allowed only one chance to conform to the requirements of OWBPA and cannot ‘cure’ a defective release by issuing a letter to employees containing OWBPA-required information that was omitted from their separation agreements and request that they either ‘reaffirm’ their acceptance or ‘revoke’ the release.” The EEOC provides no rationale for this extreme view and does not appear to consider situations in which the employee is unharmed by the error in the original release.

The EEOC also seems to take a narrow view of an employer’s ability under the OWBPA to limit a restarting of the 21-day or 45-day consideration period when the employer agrees to improve its original offer. The OWBPA regulations state that the parties may agree that material changes to the initial offer do not restart the running of the consideration period.² Some employers will rely on this provision to specify that an improved offer must be accepted within the original consideration period. In this new publication, however, the EEOC states flatly that the time period for consideration starts over if the offer is materially changed.

Third, the document provides recommendations to employees that fall outside the EEOC’s normal area of jurisdiction. The EEOC’s publication includes an appendix with an “Employee Checklist” for “What to Do When Your Employer Offers You a Severance Agreement.” Generally, this checklist restates the requirements for statutes the EEOC administers as outlined in the main document. But the checklist also includes a general recommendation that the employee ensure that her severance agreement does not release “nonwaivable rights,” including “unemployment compensation benefits, workers compensation benefits, claims under the Fair Labor Standards Act, health insurance benefits under the Consolidated Omnibus Budget Reconciliation Act (COBRA), or claims with regard to vested benefits under a retirement plan governed by the Employee Retirement Income Security Act (ERISA).” These statutes and state laws are outside the EEOC’s normal areas of jurisdiction.

The U.S. Department of Labor has primary responsibility for administering COBRA and has published its own documents with interpretive guidance. One such document specifically considers a situation in which a qualified beneficiary waives COBRA coverage, including how a beneficiary might later revoke such a waiver. Some might consider the EEOC's purported attempt to advise employees on an this area of law to be inappropriate, as well as inaccurate.

Similarly, the EEOC's suggestion that claims under ERISA cannot be waived does not appear to be based on existing legal authority. While ERISA does prohibit certain types of waivers, including waivers of future rights, it is well established that potential ERISA claims can be waived by releases that are knowing and voluntary. Finally, while many states do prohibit waivers of unemployment and workers' compensation benefits, the EEOC may act out of turn in making its blanket assumption that any such claim cannot be waived in any jurisdiction in the county.

Conclusion and Recommendations

While the EEOC publication is intended to provide guidance on the release and waiver of employment discrimination claims, it is by no means a comprehensive list of requirements for severance agreements or releases. There are many existing regulations, compliance requirements, and specific workplace issues that the document does not intend to address. The publication also does not appear to alter the validity of existing Littler guidance on releases, including Littler's July 2007 Insight, *Recent Court Decisions Identify Concerns in Drafting Releases*, on drafting releases. The following actions are suggested in response to this EEOC policy guidance:

- As always, it is important for employers to carefully draft release agreements to adequately comply with all applicable law and to ensure the enforceability of waivers of employment discrimination claims.
- Be sure releases specifically comply with points (a) through (h) above in order to comply with the OWBPA.
- Pay special attention when conducting group terminations that the age disclosure is accurate. Most often clerical mistakes, such as leaving off individuals considered for the layoff or not providing the correct ages or job titles, subject releases to invalidation.
- Consult with counsel to determine the proper decisional unit, eligibility factors, and time limits applicable to a reduction in force.

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¹ 8 F. Supp. 2d 307 (S.D.N.Y. 1998).

² 29 C.F.R. § 1625.22(e)(4).