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Employee Separation Agreements – A Refresher

Working Together

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There is one conversation I have with my clients who are employers more frequently than any other. It's the one that begins, "We've decided to let so-and-so go. Do we have to have an agreement of some kind?" Here is what you need to know about employee separation agreements.

Q: Do we *have to* have a written agreement?

A: No. Unless the employee has a contract that provides otherwise, the employer is not required to enter into any agreement in order to discharge the employee.

Q: Why would we *want to* have a written agreement?

A: It's insurance against future claims and costs. Sometimes an employer wants to provide severance pay to ease the employee's transition to a new opportunity, whether out of compassion or as an investment in a relationship that may continue in some fashion. (You never know where the person you fired might turn up in a few years.) Sometimes the employer is concerned about some kind of legal claim the employee might bring, or just wants to avoid the cost of defending frivolous claims from a disgruntled former employee. Sometimes all of these things are true. In any case, the employer can only be assured that it won't face a claim if it obtains a release (sometimes called a waiver) from the employee, and even the most well-meaning employer would be foolish to pay any severance pay without getting a release in exchange. Hence, the employee separation agreement.

Q: How can I be sure the agreement is valid?

A: Let's leave aside the particular legal rules governing releases of age discrimination claims, which we'll come back to shortly. A separation agreement is a contract. Like any contract, in order to be valid there must be a meeting of the minds on the terms of an agreement, so both parties have to *understand* what the agreement says. The agreement must be *voluntary,* so neither party can be under duress, or coerced or

threatened into signing. And the agreement must be *supported by consideration,* so the employee must receive some payment or benefit that is more than he or she would otherwise have been entitled to get, in exchange for giving the release. These requirements apply to every separation agreement.

Q: What are the special requirements for releases of age discrimination claims?

A: Now things start to get complicated. The Older Workers Benefit Protection Act (the "OWBPA"), enacted by Congress in 1990, provides that a release of a claim of age discrimination will not be considered knowing and voluntary unless:

- it is written in language "calculated to be understood" by the employee;
- it refers specifically to the Age Discrimination in Employment Act;
- the employee doesn't waive rights or claims that might arise *after* he or she signs the release;
- the employee receives actual consideration – i.e., something more than he or she would otherwise have been entitled to receive – in exchange for the release;
- the employee is advised in writing to consult with a lawyer before signing the release;
- the employee gets at least 21 days after receiving the form of release to consider whether or not to enter into the agreement;
- the employee is entitled to revoke his or her acceptance within 7 days after signing the release.

Q: Do all of these requirements apply if the employee is under 40?

A: No. An employee under 40 doesn't have any potential claims for age discrimination under federal law.

Q: Do all of these requirements apply to releases of claims other than age discrimination claims, like claims for race or sex discrimination, or breach of contract?

A: No. But remember that to be valid, *any* release must be knowing, voluntary, and supported by consideration. It may be wise, therefore, to incorporate many of the provisions that are required by the OWBPA into employee separation agreements even for employees under 40, or at least to include some versions of those provisions. For example, a release for an employee under 40 should still give the employee a reasonable time to think about whether to accept the offer, should be written so that the employee can understand it, and must be supported by actual consideration. And an employee who has been reminded that

he or she may consult counsel will have a harder time later claiming to have been somehow coerced into waiving rights. Often, however, the right to revoke acceptance is not included for employees under 40.

Q: Is that all?

A. No, wait, *there's more*! In our next post on employee separation agreements, we'll discuss the special rules that apply if the waiver is requested in connection with an incentive or other employment termination program offered to a group of employees, as well as some other best practices in this area.

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