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Inside

Equal Employment Opportunity Commission Issues New Guidance on age Discrimination Waivers and Severance Agreements

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INTRODUCTION

In our October 2008 Employment Law Commentary "Weathering the Storm: Employment Issues in an Economic Downturn," we discussed the difficult decisions that many California employers face regarding workforce reductions and employee terminations. Businesses of all sizes continue to carefully assess their economic and operational structure to decide whether they need to reduce their workforce or institute temporary work schedules and salary reductions in light of the current economic challenges. An employer's decision to lay off certain employees while retaining others may lead some discharged employees to believe that they were wrongfully terminated or discriminated against on the basis of their age, race, sex, national origin, religion, or disability. In this Commentary, we discuss the Equal Employment Opportunity Commission's recent guidance ("technical assistance") regarding key factors that employers should consider when constructing a valid waiver of discrimination claims for employees who will be provided with a severance agreement at the time of their termination.

THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S TECHNICAL ASSISTANCE DOCUMENT

On July 15, 2009, during its commission meeting, the Equal Employment Opportunity Commission (EEOC) issued a technical assistance document to assist both employees and employers with navigating the rules regarding waivers of potential discrimination claims. The document contains a checklist for employees to consult before they sign a waiver and a sample release agreement for employers to consider when drafting the waiver. The document also includes a separate section on the Older Workers Benefit Protection Act (OWBPA), a law added by Congress in 1990 to amend the Age Discrimination and Employment Act (ADEA) to clarify prohibitions against discrimination on the basis of age for employees age 40 and over. OWBPA lists seven *additional* factors that must be satisfied for a waiver of age discrimination claims to be considered "knowing and voluntary":

- a waiver must be written in a manner that can be clearly understood;

- a waiver must specifically refer to rights or claims arising under the ADEA;
- a waiver must advise the employee in writing to consult an attorney before accepting the agreement;
- a waiver must provide the employee with at least twenty-one (21) days to consider the offer;
- a waiver must give an employee seven (7) days to revoke his or her signature;
- a waiver must not include rights and claims that may arise after the date on which the waiver is executed; and
- a waiver must be supported by consideration in addition to that to which the employee already is entitled.

In addition, if an employee who is age 40 or over is part of a group termination such as a reduction in force (sometimes referred to as "exit incentive programs") or another employment termination program, the employer must provide additional information in connection with the waiver, such as details about the selection criteria and the class of employees

Alternatives to Layoffs

Salary Reductions for Exempt Employees

On August 19, 2009, the Chief Counsel of the Division of Labor Standards Enforcement for the State of California ("DLSE") issued an opinion letter analyzing whether the salary basis test for payment of exempt employees precluded an employer from implementing a temporary work schedule and salary reduction in order to avoid or limit the need for layoffs. The DLSE opined that, under both California and federal law, the salary basis test for exempt employees permitted work schedule and salary reductions to avoid layoffs. The DLSE further concluded that "neither the Labor Code and Industrial Welfare Commission wage order provisions, nor the federal law upon which the pertinent provisions of California law is based" prohibit employers from implementing proposed reductions in the work schedule and salary of exempt employees. The letter was based on an employer who wished to reduce both its non-exempt and exempt employees to a four-day workweek, reducing the salary of exempt employees by twenty percent and not paying the non-exempt employees for that day. Additionally, the employer had previously conducted layoffs and was only pursuing the work schedule and salary reduction because it was experiencing significant economic difficulties due to the present severe economic downturn. The employer intends to restore both the full five-day work schedule and full salaries of its exempt employees as soon as the business conditions permitted.

Salary Basis Test

The salary basis test is set forth in California Labor Code § 515(a) and the applicable wage order and states that an employee must earn a monthly salary equivalent to no less than two (2) times the state minimum wage for full-time employment (40 hours per week) in order to satisfy the test. DLSE further explained that it follows the general federal interpretations under the federal Fair Labor Standards Act (FLSA) salary basis test with respect to allowable deductions for absences to the extent the interpretations are not inconsistent with specific provisions in the Labor Code or Industrial Welfare Commission Orders. Salary reduction may not reduce the amount paid to the employee to less than the minimum standard required under the applicable law. The United States Department of Labor (DOL) released a series of opinion letters extending as far back as 1970 in which the DOL consistently concluded that the salary basis test did not preclude a bona fide fixed reduction in the salary of exempt employees to correspond with a reduction in the normal workweek *so*

long as the reduction is not designed to circumvent the requirement that employees be paid their full salary in any week in which they perform work. A fixed reduction in salary that becomes effective during a period when a company operates a shortened workweek due to economic conditions was found to be a bona fide reduction that was not designed to circumvent the salary basis payment. Federal appellate and trial court decisions further support the conclusion that an employer's proposal to reduce its exempt employees' work schedules and salaries does not violate the salary basis test.

The Employment Development Department's Work Sharing Unemployment Insurance Program

The Employment Development Department's (EDD) work sharing program is an alternative to layoffs that has seen an increase in participation this year. The program was initially a safety net created by California state lawmakers in 1978 to spare workers from total unemployment during economic downturns, and to allow employers to avoid the cost of recruiting, hiring, and training new employees when the economy once again improves. This little-known state program pays partial unemployment benefits for employees whose hours and wages have been cut. Work sharing benefits are funded through payroll taxes, similar to regular unemployment insurance. In order to participate in the program, an employer must complete an application and submit a plan that meets the program's requirements. Among these program requirements is that 10 percent of the employer's workforce or a unit of that workforce be affected by at least a 10 percent reduction in wages and workforce hours.

The forms must be checked and processed by hand due to the complexity of the application, yet the Employment Development Department, which runs the Work Sharing Unemployment Insurance Program, recently reported that the majority of claims are still paid within seven days of receipt of the application. Once the plan has been approved, the benefits are paid to the participating employees in proportion to the percentage that their hours and wages have been reduced. For example, when an employee's wages and hours are cut by 20 percent, or one day a week, the employee's work sharing benefits would be 20 percent of the unemployment insurance benefits that they would have received had they been unemployed. The maximum unemployment benefit for an individual who is unemployed is $450 per week. ■

who were (and were not) selected for the program. The employer must also give the group 45 days to consider the offer.

SEVERANCE AGREEMENTS–BACKGROUND

Workforce reductions and employee terminations have become all too common in the current economic climate. To minimize the potential of litigation that employers may face from employees who believe that they were discriminated against based on their age, race, sex, national origin, religion, or disability, many employers now offer departing employees severance packages or continued benefits in exchange for a release of liability or ("waiver") for all claims related to the employment relationship, including discrimination claims under the civil rights acts enforced by the Equal Employment Opportunity Commission (EEOC), such as the Age Discrimination in Employment Act (ADEA), Title VII, the Americans with Disabilities Act (ADA), and the Equal Pay Act (EPA). Employees are typically offered severance agreements and asked to sign a waiver at the time of their termination unless severance provisions were previously discussed and

negotiated when the employee was initially hired, which is often the case for senior-level executives and other high-level employees.

An employer may give an employee a severance agreement that requires the employee to waive his or her right to sue the employer for wrongful termination based on age, race, sex, disability, and other types of discrimination. Most signed waivers will likely be enforceable if they meet both contract principles and statutory requirements, but an employer cannot lawfully limit an employee's right to testify, assist, or participate in an investigation, hearing, or proceeding conducted by the EEOC, or prevent an employee from filing a charge of discrimination with the EEOC. Additionally, an employer cannot lawfully require an employee to return money or benefits received in exchange for signing the waiver if the employee later elects to file a charge against the employer. Additional information on waivers in severance agreements and a sample release agreement for employers can be found on the Equal Employment Opportunity Commission's website under "Understanding Waivers of Discrimination Claims in Employee Severance Agreements," available at http://www.eeoc.gov/policy/docs/qanda_severance-agreements.html and further detailed below.

CONSIDERATION

A severance agreement (also referred to as a "separation agreement," "release agreement," "termination agreement," or "separation agreement general release and covenant not to sue") is a contract between an employer and an employee that specifies the terms of the termination, such as a layoff. Like any other contract, a severance agreement must be supported by "consideration," which is something of value to which a person is not already entitled that is given in exchange for an agreement to do, or refrain from doing, something. Consideration cannot simply be a pension benefit or payment for vacation or sick leave that has already been earned by the employee, or that the employee is already entitled to, but rather should be something of value that is in addition to the employee's existing entitlements. Examples are a lump sum payment of a percentage of the employee's annual salary or continued payments of the employee's salary or benefits for a specified period of time after the termination.

"KNOWING AND VOLUNTARY"

A waiver in a severance agreement is only valid when an employee "knowingly and voluntarily" consents to the waiver. The rules for waivers under the Age

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Discrimination and Employment Act are defined by a statute—the Older Workers Benefit Protection Act (OWPA)—while the rules under other civil rights laws, such as Title VII, are derived by case law.

In determining whether an employee "knowingly and voluntarily" waived his or her discrimination claims, some courts rely on traditional contract principles by focusing primarily on whether the language in the waiver is clear and unambiguous, while others look beyond the contract language and consider all relevant factors—the totality of the circumstances—to determine whether the employee "knowingly and voluntarily" waived his or her right to sue. The following are circumstances and conditions under which a waiver may be signed that will be considered by some courts:

- whether it was written in a manner that was clear and

specific enough for the employee to understand based on his or her education and business experience;

- 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 think about the advantages and disadvantages of the agreement before signing it;
- whether the employee consulted with an attorney or was encouraged or discouraged by the employer when doing so;
- whether the employee had any input in negotiating the terms of the agreement; and,
- whether the employer offered the employee consideration (*e.g.*, severance pay, additional benefits) that exceeded what the employee already was entitled to by law or contract and the employee accepted the offered consideration.

ADDITIONAL ISSUES FOR EMPLOYERS TO CONSIDER

It is important to note that even if an employee signs a severance agreement, the employee can still file a charge or lawsuit alleging discrimination. If such a situation arises, an employer will argue that the court should dismiss the lawsuit because the employee waived his or her right to sue, as an employee's signature generally indicates acceptance of the terms of the severance agreement. Although most employees who sign waivers never attempt to challenge them, some employees who have been terminated feel as though they did not have a choice but to sign the waiver, even though they may have suspected discrimination at the time, or they may have learned some new information after having signed the waiver which led them to believe that they had been discriminated against during the employment or wrongfully terminated by the employer. No agreement between an employee and an employer can ever limit an employee's right to testify, assist, or participate in an investigation, hearing, or proceeding conducted by the EEOC under the ADEA, Title VII, the ADA, or the EPA. Any provision in a waiver that attempts to waive these rights will likely be found to be invalid and unenforceable. ■

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