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Do Your Severance Agreements Pass the Test?

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Whether it is a single-employee termination or a large scale reduction-in-force, many employers find that written severance agreements are a useful tool to eliminate uncertainty and reduce potential liability arising out of the termination. However, as one recent case shows, even Fortune 500 companies can't escape liability if their severance agreements do not strictly comply with the federal law that governs employment severance agreements.

In *Thomforde v. IBM*, (Case No. 04-1538, 8th Cir., May 3, 2005), plaintiff Dale Thomforde worked for IBM in Minnesota for 28 years as an engineer when he was selected for an involuntary reduction in force. IBM agreed to pay Thomforde severance benefits if he signed a written "General Release and Covenant Not to Sue" ("Agreement"). The Agreement provided, among other things, that by signing it Thomforde released IBM "from all claims . . . [he] may have against IBM of whatever kind . . . [including] claims arising under the [federal Age Discrimination in Employment Act ("ADEA")] . . . and any other federal, state or local law dealing with discrimination in employment . . . ." Three paragraphs later the Agreement provided that "[y]ou agree that you will never institute a claim of any kind against IBM . . . including, but not limited to, claims related to your employment with IBM." However, in an attempt to comply with a federal regulation governing severance agreements, the Agreement later stated that "[t]his covenant not to sue does not apply to actions based solely under the [ADEA]."

Thomforde signed the Agreement, collected the severance benefits, and then sued IBM for age discrimination under the federal ADEA. IBM moved to dismiss the case based on Thomforde's voluntary execution of the Agreement. The trial court agreed with IBM, and dismissed the case. Thomforde appealed that decision to the U.S. Court of Appeals for the Eighth Circuit (which covers Nebraska). The federal appeals court sided with Thomforde and reinstated his lawsuit against IBM. According to the Eighth Circuit, because the Agreement did not satisfy the "strict and unqualified" requirements of the federal Older Workers' Benefits Protection Act ("OWBPA"), it was not effective and did not bar Thomforde from suing IBM for age discrimination. Among other things, the appeals court concluded that the Agreement was ambiguous. While "[t]he intended effect of the Agreement was to release the employee's substantive claims under the ADEA, while preserving the employee's

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right to challenge the validity of the release through a lawsuit, as provided by the regulations (29 C.F.R. 1625.23(b)) . . . the Agreement does not explain how the [release and covenant not to sue] relate to each other or the limited nature of the exception to the covenant not to sue in light of the release of claims." Because the Agreement did not meet the OWBPA's strict requirement that it be written in a manner calculated to be understood by the employee, the Agreement was ineffective and Thomforde was permitted to sue IBM for age discrimination.

LESSON:

Adopted in 1990, the OWBPA amended the federal ADEA to provide for minimum requirements for a knowing and voluntarily release of claims under the ADEA. Regulations implementing the OWBPA provide that a waiver is not "knowing and voluntary" unless it meets all of the following requirements:

> The waiver must be part of written agreement that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
>
> The waiver agreement must refer to the ADEA by name in connection with the waiver;
>
> The written agreement must advise the employee to "consult with an attorney prior to executing the agreement";
>
> Under the waiver agreement the individual cannot waive rights or claims that may arise after the date the waiver is executed;
>
> In exchange for the waiver, the individual must receive "consideration in addition to anything of value to which the individual already is entitled
>
> In instances of single-employee terminations, the individual must be given a period of at least 21 days within which to consider the agreement;
>
> In instances where a waiver is requested in connection with an exit incentive or other employment termination program ("program" is defined to include voluntary and involuntary terminations affecting two or more employees) offered to a group or class of employees, the individual must be given a period of at least 45 days within which to consider the agreement;
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> The 21- or 45-day period runs from the date of the employer's final offer. Material changes to the final offer restart the running

of the 21- or 45-day period, although the parties may agree that changes do not restart the running of the 21 or 45 day period. Moreover, an employee may sign a release prior to the end of the 21- or 45-day time period, provided that the employee's decision to accept such shortening of time is knowing and voluntary and is not induced by the employer through fraud, misrepresentation, a threat to withdraw or alter the offer prior to the expiration of the 21- or 45-day period, or by providing different terms to employees who sign the release prior to the expiration of such time period;

The waiver agreement must provide that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired. The 7-day revocation period cannot be shortened or waived;

If the waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the 45-day period) must inform the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to:

- Any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

- The job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program. Information regarding ages must be broken down according to the age of each person eligible or selected for the program and each person not eligible or selected for the program. The use of age bands broader than one year (such as "age 20-30") is not permitted.

See 29 C.F.R. §1625.22.

Properly drafted severance agreements are a legitimate tool for employers to reduce the risk involved in any termination. However, as the *Thomforde* decision makes clear, such agreements are not effective unless they comply with the very strict requirements of the OWBPA. Employers using severance agreements are encouraged to consult with experienced employment law counsel to determine whether their severance agreements comply with the OWBPA and this new court decision.

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