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EEOC Issues New Guidance On Waivers Of Discrimination Claims In Employee Severance Agreements

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As has been reported routinely for many months, the extraordinary economic downturn has caused an unfortunate and still on-going stream of shutdowns, furloughs, and reductions-in-force ("RIFs"). To minimize potential legal exposure, from RIFs, many employers offer exiting employees severance compensation or benefits in exchange for waivers releasing the employers from any potential discrimination claims under state, local, and federal employment laws, including the Age Discrimination in Employment Act ("ADEA"), Title VII of the Civil Rights Act, the Americans with Disabilities Act ("ADA"), and the Equal Pay Act ("EPA"), as well as common law claims. Recognizing this, the Equal Employment Opportunity Commission ("EEOC") recently published guidance, titled *Understanding Waivers of Discrimination Claims in Employee Severance Agreements*, which attempts to summarize, in plain language, the statutory requirements for valid individual and group waivers under the ADEA, Title VII, the ADA, and the EPA. Although organized in a Q&A format targeted to employees, the guidance is also a valuable compliance tool for employers and their Human Resource departments. Below are highlights from this new guidance.

The guidance first discusses generally the nature of severance agreements with a release of claims and the general elements necessary for valid and enforceable waivers, particularly the requirement that a wavier be made knowingly and voluntarily. It then focuses on the unique requirements for release of ADEA claims under the Older Workers Benefits Protection Act ("OWBPA"). It also emphasizes that a waiver cannot prevent an employee from filing a discrimination charge with the EEOC or from testifying or participating in an agency investigation. The guidance explains that if an employee files an EEOC charge after signing a waiver, the employer cannot require the employee to return the severance pay he or she received. Similarly, after signing a waiver, an employee is not required to return severance pay before filing an age discrimination lawsuit (the courts are split on this issue under Title VII, the ADA or the EPA). However, if an employee successfully challenges a waiver, the court should

reduce any monetary award by the amount of consideration the employee received for signing the waiver.

The guidance next addresses in detail the specific minimum requirements established by the OWBPA for a wavier of ADEA age discrimination claims to be considered "knowingly and voluntarily" According to these factors, the waiver must (1) be written in plain language easily understood by the employee eligible for termination; (2) specifically refer to rights or claims arising under the ADEA; (3) advise the employee, in writing, to consult an attorney before accepting the agreement; (4) provide the employee with at least 21 days (45 days for a program offered to a group or class of employees) to consider the offer; (5) provide the employee seven days to revoke his or her signature; (6) provide additional consideration beyond what the employee is already entitled; and (7) not waive future rights and claims. Furthermore, the guidance takes the position that employers "cannot attempt to 'cure' a defective waiver by issuing a subsequent letter containing OWBPA-required information that was omitted from the original agreement." Material changes in the offer restart the 21-day or 45-day period for consideration.

The guidance then highlights the additional information employers must provide employees for "programs" offered in connection with group layoffs. Specifically, employees are entitled to information on: (1) the decisional units (portion of the company from which the employer selected the employees to terminate); (2) the eligibility factors for the program; (3) the time limits applicable to the program; and (4) the job titles and ages of all the employees who are eligible or were selected for the program and the ages of all individuals in the same job classification or organization unit who are not eligible or were not selected for the program. The EEOC describes this information as needed to allow employees to determine, before signing the waiver, whether age discrimination motivated the termination selections.

Notably, although both the EEOC's regulations and a sample waiver and release attached to the guidance indicate that the requirement to disclose "eligibility factors" runs to the general determination of who is and is not eligible for a particular program, in the guidance the EEOC notes without further comment that some courts have interpreted this to mean the actual criteria, such as job performance, experience or seniority, relied upon in making the final termination decision. *Compare, e.g., Pagliolo v. Guidant Corp*., 483 F. Supp. 2d 847 (D. Minn. 2007) (holding a release violated OWBPA by, among other things, failing to identify the general criteria by which employees were selected for termination) with *Rupert v. PPG Industries, Inc*., No. 07cv005, 2009 WL 596014, *49-*57 (W.D. Pa. Feb. 26, 2009) (reviewing decisions and rejecting any requirement to provide the criteria relevant to specific termination decisions, noting, *inter alia*, the absence of such factor in the EEOC's sample disclosure form). Thus, the EEOC fails to resolve or offer direction on this potentially vexing issue affecting the practical administration of severance programs.

Finally, the guidance includes an employee checklist on what to do when offered a severance agreement. As employees and their attorneys are likely to follow this

closely, employers also should review this checklist in preparing and offering a severance agreement.

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