By Christina L. Lewis

Money For Nothing: Is It Possible For Attorneys Representing Employers To Draft an Enforceable Waiver and Release Agreement?

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Employers terminating employees routinely enter into severance agreements pursuant to which the employer pays significant money to departing workers in exchange for a release of claims. These severance agreements serve the symbiotic purpose of protecting the employer from possible claims by the employee and providing the employee with valuable consideration. In recent months, there have been a number of decisions addressing the validity of waivers and releases entered into between employers and employees. In the wake of increased litigation on this issue, there are circuit splits, contradicting case law, and resulting uncertainty regarding how to draft waiver and release language that will survive judicial scrutiny. This article summarizes recent developments in the law regarding the enforceability of waivers and releases and highlights potential legal issues that may affect legal practitioners and employers alike.

I. Waiving Claims Under The Age Discrimination In Employment Act ("ADEA")

When a departing employee is age forty or older, waivers and releases often include a waiver of age discrimination claims under the ADEA. The Older Workers Benefit Protection Act ("OWBPA"), the 1990 amendment to the ADEA, enumerates specific elements that must be contained in the agreement.[1] There are several recent cases invalidating general releases for failure to comply with the OWBPA. Courts strictly construe the statute such that any deviation from its enumerated requirements, no matter how *de minimis*, may invalidate the entire release.[2]

For example, in *Syverson v. International Business Machines Corp*., 461 F.3d 1147 (9th Cir. 2006), the Ninth Circuit invalidated IBM's general release and covenant not to sue on the grounds that it failed to meet the OWBPA requirement that the agreement "be easily understood." The IBM agreement provided for both a release of all claims and a covenant not to sue. While the release provision included a release of all claims under the ADEA, the covenant not to sue contained an exception for ADEA claims.[3] The court found that the exception in the covenant not to sue provision could be interpreted to contradict the release provision; therefore, it was not "easily understood" by employees.

The *Syverson* case followed *Thomforde v. IBM*, 406 F.3d 500 (8th Cir. 2005), an Eighth Circuit decision invalidating the same IBM release for similar reasons. The *Thomforde* court further explained that, when IBM chose to use legal

terms of art in the release (such as "covenant not to sue"), it had a duty to carefully explain how the release and covenant not to sue provisions related to each other. *Id.* at 504.

In order to avoid the IBM pitfalls, attorneys representing employers should be careful to comply with the OWBPA provisions governing the waiver of ADEA claims. While the IBM cases revolved around the "understandability" standard, any deviation from the requirements enumerated in the OWBPA poses a risk that the entire agreement will be held unenforceable. *See, e.g., Kruchowski v. Weyerhaeuser Co.*, 446 F.3d 1090 (10th Cir. 2006) (invalidating a release agreement for failure to comply with OWBPA's requirements applicable to group termination programs). In addition, while employers want assurances that the waiver and release will cover every contingency imaginable, attorneys must resist the temptation to use legalese and catch-all terms of art to ensure that the waiver and release is understandable to the average employee.

II. Waiving The Right To File Administrative Charges

Recently, there have been several cases addressing two important issues: 1) whether releases preventing employees from assisting a governmental agency which is investigating charges are valid; and 2) whether releases preventing employees from filing charges with the EEOC are valid. Courts that have addressed the first issue unanimously agree that an employer may not prevent employees from aiding an EEOC investigation of charges, even in exchange for severance pay. *See, e.g., EEOC v. Astra*, 94 F.3d 738 (1st Cir. 1996); *EEOC v. Cosmair, Inc.*, 821 F.2d 1085 (5th Cir. 1987).

The First Circuit has not issued an opinion on whether waiver and release agreements preventing employees from filing administrative charges are valid, but has indicated in dicta that it will not uphold such agreements. *See EEOC v. Astra*, 94 F.3d at 746 (refusing to consider the issue of whether releases prohibiting employees from filing charges with the EEOC are valid, explaining, "[t]he difficult, highly ramified questions that surround the validity of non-filing covenants counsel persuasively against reaching out past what is required during the preliminary injunction phase."); *American Airlines, Inc. v. Cardoza-Rodriguez,* 133 F.3d 111, 118, n. 7 (1st Cir. 1998), (noting in a footnote, "[a]s the employees point out, the waiver is also deficient in another manner. The waiver broadly prohibits employees from maintaining any legal proceedings of any nature whatsoever against [the employer]…[n]o waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission"). In addition, the United States District Court for the District of Massachusetts has held that waivers that interfere with an employee's right to file charges with the EEOC and to participate in EEOC proceedings or investigations are invalid. *See Commonwealth of Massachusetts v. Bull HN Information Systems, Inc.,* 143 F. Supp.2d 134 (D.Mass. 2001) (invalidating releases which broadly prohibit an employee from filing charges with the EEOC or from participating in an EEOC investigation).

The most recent decision on this issue was rendered by the Sixth Circuit on October 24, 2006. In *EEOC v. Sundance Rehabilitation Corp.*, 466 F.3d 490 (6th Cir. 2006), the Sixth Circuit agreed that "[t]here can be little doubt that the filing of charges and participation by employees in EEOC proceedings are instrumental to the EEOC's fulfilling its investigatory and enforcement missions." However, the court refused to issue a definitive ruling on whether waivers that proscribe filing charges with the EEOC are enforceable, stating, "…it may well be that the charge-filing ban in the Separation Agreement at issue here is unenforceable…[b]ut we need not rule on the enforceability of the Separation Agreement or any of its specific provisions, because that question is not before the court." *Id.* at 499-500.

Significantly, courts have acknowledged that a provision prohibiting employees from recovering monetary damages resulting from charges filed with the EEOC is enforceable. *See, e.g., Sundance*, *supra*; *EEOC v. Lockheed Martin,* 444 F. Supp.2d 414, 420 (D. Md. 2006) at 12. As a result, even if the agreement does not prevent employees from filing charges with the EEOC, the release may prohibit any monetary recovery resulting from such a charge.

In light of recent precedent, attorneys concerned about the enforceability of a waiver and release agreement should not include language in the agreement that prohibits employees from cooperating with the EEOC in an investigation. Furthermore, any provision preventing employees from filing charges with an administrative agency is also vulnerable to challenge. It appears, however, that attorneys

representing employers can safely include a provision in the waiver and release agreement prohibiting employees from recovering monetary damages if the employee files a charge with an agency. As a practical matter, the removal of an incentive for monetary gain may discourage some employees from opting to file charges.

III. Waiving Claims Under The Family And Medical Leave Act ("FMLA")

The circuits are split over the validity of agreements that waive FMLA claims. The plain language of the Department of Labor regulations suggests that employees cannot waive FMLA claims. *See* 29 C.F.R. §825.220 (stating, "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA"). Some courts have interpreted the regulation language plainly, invalidating waivers of FMLA claims. For example, in *Taylor v. Progress Energy, Inc.,* 415 F.3d 364 (4th Cir. 2005), the Fourth Circuit held that a release of FMLA claims, as a matter of law, is unenforceable. The *Taylor* case was recently reaffirmed by the Fourth Circuit after a petition for rehearing *en banc*, even though the Department of Labor, interpreting its own regulations, filed an amicus brief taking the position that the FMLA bars only the prospective waiver of FMLA rights. *See Taylor v. Progress Energy, Inc.*, 493 F.3d 454, 456 (4th Cir. 2007) (stating, "[a]fter reconsideration, we remain convinced that the plain language of section 220(d) precludes both the prospective and retrospective waiver of all FMLA rights…").

However, the Fifth Circuit issued a contrary decision in *Faris v. Williams WPC-I, Inc.,* 332 F.3d 316 (5th Cir. 2003). In *Faris*, the Fifth Circuit distinguished between FMLA "interference" claims, which cannot be released, and FMLA discrimination/retaliation claims, which can be released. In other words, the court held that, since the waiver in question only applied to the post-dispute claims (retaliation claims) and did not apply to a cause of action for substantive claims (such as rights to leave and reinstatement), the waiver was valid.[4] *Id.* at 320.

No federal court in this jurisdiction has yet addressed this issue, and as a result, there is no controlling decision. Notably, the Department of Labor has, in past amicus briefs filed on this issue, taken the position that "past" FMLA claims are waivable, and that it is only "future" FMLA claims that cannot be waived. As a result, there is a strong argument that an agreement waiving "past" claims under the FMLA is enforceable. *See also Dougherty v. TEVA Pharmaceuticals USA, Inc.*, 2007 WL 1165068 (E.D. Pa. Apr. 9, 2007) (noting that courts grant an agency's interpretation of its own regulations considerable legal leeway). However, since this area remains unsettled in this jurisdiction, an employer wishing to include language waiving "past" claims under the FMLA should also include a severability clause to save the remainder of the agreement in the event the court finds that the waiver of such claims is unenforceable.

IV. Conditioning Severance Pay On Signing A Release And Waiver

The EEOC has taken the position that severance pay conditioned on the employee signing a release is "facially retaliatory" and invalid. At least one court has sided with the EEOC on this issue. In *EEOC v. Lockheed Martin Corp.*, *supra.*, the Maryland district court held that conditioning severance pay on the employee signing a waiver and/or release was facially retaliatory and prohibited. The employer argued that the employee was not entitled to severance pay, and therefore, conditioning the receipt of severance pay on signing the release could not be retaliatory. The court held that "[a] benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all." 444 F. Supp. 2d at 419, quoting *Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984). The court went on to state, "[w]hether severance benefits are a right or a discretionary gift or anything in between is therefore irrelevant. Lockheed might well have been free to offer severance benefits to no one, but it cannot provide them only to employees who refrain from participating in protected activity…To do so is to discriminate against [an] employee…because [s]he has made a charge and is unlawful" *Id.* Quoting 42 U.S.C. § 2000e-3(a).

The Sixth Circuit addressed the same issue in *EEOC v. Sundance Rehabilitation Corp.*, *supra.* The Sixth Circuit held that the mere offering of severance pay conditioned on a release was not retaliatory on its face. However, the court issued a very narrow decision, expressly refusing to rule on whether a company's attempt to enforce the agreement would amount to retaliation. The court left open the possibility that an employee can sue for retaliation, but only after the employee signs the agreement, accepts the severance package, and files a charge with the EEOC, and the company sues to enforce the agreement. As a result, the holding is a dubious victory for employees.

Despite this recent trend, there are several cases holding that an employer's refusal to pay severance when an employee refuses to sign a release does not amount to an adverse employment action. *See, e.g., Davis v. Precoat*, 328 F. Supp. 2d 847, 851 (N.D. Ill. 2004); *Hansen v. Vanderbilt Univ.*, 961 F. Supp. 1149, 1153 (M.D. Tenn. 1997) (stating, "[t]he Court

finds that requiring an employee to withdraw an EEOC claim in order to have a recommended settlement award implemented is not an adverse employment action").

No Massachusetts federal court has ruled on this issue yet.[5] The EEOC is, however, taking a strong position, fervently arguing that conditioning severance pay on signing a release is an "adverse employment action" on its face. Most recently, the EEOC filed suit in Ohio against Sara Lee Corporation on this exact issue. *See EEOC v. Sara Lee Corp.*, 1:06 CV 645 (S.D. Ohio, filed September 29, 2006). Since there is no clear authority in this jurisdiction on this issue and there are cases upholding releases that were signed in exchange for severance pay, this is an uncertain area of the law. If the EEOC does not have any future success in litigating this issue, the *Lockheed* case may prove to be anomalous. In the interim, clients may need to be advised of the EEOC's position on this issue and its proclivity to litigate this issue on behalf of employees.

Conclusion

Recent cases addressing the enforceability of waivers and releases have made it virtually impossible to draft an agreement that is certain to withstand challenges by employees. Employers are no longer able to recycle pre-fabricated waiver and release agreements designed to protect the employer from every imaginable claim. Such broad agreements are vulnerable to challenge and may be held unenforceable.

However, it is possible to draft a waiver and release that incorporates the recent decisions in this jurisdiction and that attempts to circumvent some of the adverse holdings by other courts.[6] To increase the likelihood that a court will enforce a waiver and release, attorneys representing employers should consider the following: 1) the employee should not be prohibited from cooperating with the EEOC in an investigation; 2) attorneys should carefully consider their options before including language that prohibits an employee from filing charges with an administrative agency; furthermore, if the waiver and release does prohibit an employee from filing charges with any agency, it should also include a severability clause; 3) attorneys should consider including a provision wherein the employee acknowledges that he or she will not recover any monetary benefit from filing a charge with an agency; 4) the waiver and release should not contain a waiver of FLSA claims; 5) the waiver and release should include a provision stating that the employee understands the Waiver and Release, which may provide a defense under the OWBPA (which requires the release to be "easily understandable"); and 6) the language should be simplified to comply with the EEOC regulations and the OWBPA, which require all releases and waivers to be understandable. ■

Endnotes

1. First, the OWBPA requires that any waiver must be in writing and drafted in plain language calculated to be understood by the person who will sign the agreement. Accordingly, the employer should consider such factors as the education and comprehension level of the signer, which "usually will require the limitation or elimination of technical jargon and of long, complex sentences." *See* 29 C.F.R. § 1625.22(b)(3) (2005). In addition, a valid waiver must: 1) specifically refer to ADEA rights or claims; 2) not waive rights or claims that may arise in the future; 3) be in exchange for valuable consideration; 4) advise the individual in writing to consult an attorney before signing the waiver; and 5) provide the individual at least 21 days to consider the agreement and at least seven days to revoke the agreement after signing it. If the agreement is offered to a group or class of employees (i.e., a reduction in force) there are additional requirements, including, among other things, that the employer provide the group or class of employees with certain demographic data of the employees selected for the termination program. *See* 29 C.F.R. §1625.22(b)(5)-(7).

2. This recent trend is especially troubling for employers given the 1998 United States Supreme Court case, *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998), which held that, if the waiver and release does not comply with the OWBPA, an employee can bring a claim under the ADEA without first tendering back to the employer the benefits he or she received.

3. IBM included the exception in the covenant not to sue in order to comply with an EEOC regulation, which states that no ADEA waiver agreement, covenant not to sue, or the equivalent may impose any penalty (including attorneys' fees and/or damages) for filing suit under the ADEA. *See* 29 C.F.R. § 1625.23(b).

4. At least one district court recently reached the same conclusion as the Fifth Circuit. *See Dougherty v. TEVA Pharmaceuticals USA, Inc.*, 2007 WL 1165068 (E.D. Pa. Apr. 9, 2007) (vacating its previous decision on this issue, and holding that the regulation does not prevent an employee from waiving or settling any claims for past violations of the FMLA).

5. While there is no definitive ruling on this precise issue, the District of Massachusetts has held in *Commonwealth v. Bull HN Information Systems, Inc.*, 16 F.Supp.2d 90 (D.Mass.,1998) that, if a waiver of ADEA claims is valid under the stringent standards of the OWBPA, an employer is not retaliating by merely seeking to enforce it. However, if the waiver fails to meet these standards, an employee can make a claim of retaliation if the employer takes discriminatory action against the employee for engaging in protected conduct.

6. It should also be noted that an employer cannot incorporate a waiver of minimum wage and overtime claims as part of a settlement agreement unless the release is supervised by a court or by the U.S. Department of Labor. *Brooklyn Savings Bank v. O'Neil,* 324 U.S. 697 (1945). Any unsupervised settlement of FLSA claims is subject to subsequent claims. As a result, attorneys concerned about the enforceability of a waiver and release agreement should not include a waiver of FLSA claims.