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Labor and Employment Law Information Memo

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EEOC ISSUES FINAL REGULATION ON WAIVERS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT

Many employers offer terminated or laid-off employees significant severance benefits in exchange for a release of any claims and an agreement not to sue. This has not always stopped employees who accept the severance benefits from suing, particularly when the employee believes the release does not comply with the requirements of the Older Workers Benefit Protection Act ("OWBPA"), which sets specific requirements for release of claims under the Age Discrimination in Employment Act ("ADEA"). On December 5, 2000, the EEOC issued a regulation which refines the requirements for a valid ADEA waiver and which limits an employer's ability to prevent an employee who has signed a waiver from filing suit.

The EEOC's final regulation is influenced strongly by the United States Supreme Court's decision in *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998), holding that a former employee is not required to "tender back" his severance benefits before commencing an ADEA action, where the validity of the ADEA release he signed is at issue. The EEOC's new regulation may cause some employers to change the way they draft separation agreement and release documents.

The Tender Back Issue

Employers have long contended that under contract law principles, an employee who has signed a release should be required to give (tender) back the severance benefits before suing the

employer for discrimination. Otherwise, the argument goes, the employer is deprived of the benefit of its bargain. This contention was flatly rejected, at least with respect to ADEA claims, by the Supreme Court in *Oubre*, and the EEOC confirms that rejection in its recent regulation. Section 1625.23(a) provides that an individual who claims his ADEA waiver agreement or covenant not to sue was not knowing and voluntary does not have to tender back the compensation he received for signing the agreement before commencing a lawsuit or filing an administrative charge with the EEOC, or a state agency acting as a deferral agency for EEOC, for example, the New York State Division of Human Rights. As a result, any provision in a severance agreement requiring the employee to do so, again at least with respect to ADEA waivers, is invalid. Of course, the EEOC does not have the power to regulate waivers of state law claims, and the regulation does not apply to federal claims other than ADEA claims.

Covenants Not to Sue

EEOC's final regulation also provides that a covenant not to sue cannot contain any penalty for violating the covenant. In addition to prohibiting repayment of severance for violating the covenant not to sue, the regulations prohibit an employer from requiring the employee to pay its attorneys' fees or any damages associated with filing an ADEA suit which breaches the covenant. The EEOC's comments on

the regulation make clear that such a penalty provision is invalid even if the waiver is ultimately found to be valid under the OWBPA, although the regulation does permit recovery of attorneys' fees under the governing legal standard, *i.e.*, a lawsuit brought in bad faith. Like the tender back regulation, the covenant not to sue provision only applies to covenants not to sue under the ADEA.

Recoupment and Restitution

Can the employer recover the severance payment it made if a court finds the ADEA waiver was invalid? Perhaps, but that will be up to the court. The regulations provide that if the employee successfully challenges the validity of the waiver and ultimately prevails on his ADEA claim, the court has discretion to allow the employer a setoff of some or all of the severance benefit paid against the damage award. Significantly, the regulation provides that the setoff can never exceed the amount recovered by the employee as damages. Although the Commission recognizes that its regulation would permit an employee to keep all of a severance payment where the employee lost the ADEA suit (recovered no damages), its rationale for placing a limit on the possible setoff is based on its belief that the prospect of having to tender back the severance in the event the suit is lost might deter employees from pursuing their claims.

Abrogation Of Duties

Finally, the EEOC's regulation prohibits an employer from ceasing to perform its obligations under a severance agreement, even after the ADEA waiver has been found to be invalid. In other words, if a court found the waiver to be invalid and the agreement provided for severance payments over time, the employer would have to continue making the payments, even though it no longer had a valid release of the ADEA claim.

Practical Consequences

Should you change your severance agreements? The answer to that question depends on what you want to accomplish. Under the new regulations, an individual who has signed a severance agreement and release which includes a release of ADEA claims and a covenant not to sue is free to file an ADEA claim anyway, and challenge the validity of the waiver. As a result of the regulations, there is really nothing an employer can do to provide an incentive for the employee not to do so. The employer cannot require tender back of the severance prior to suit or for violation of the covenant not to sue and cannot include a provision for payment of attorneys' fees or damages for violation of the waiver and covenant not to sue. It cannot recover any of the severance paid if the employee ultimately loses the suit.

One option to consider is using two different types of severance agreements: one type for individuals over age 40 who will be waiving ADEA claims and another type for individuals under 40, who are not protected by the ADEA. The non-ADEA agreements could contain tender back provisions and penalties for violating the covenant not to sue.

If you have any questions regarding the EEOC's recent regulation or drafting separation agreements, please contact your Bond, Schoeneck & King labor attorney or one of the Bond, Schoeneck & King partners listed below.

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