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EEOC Insights Into Severance Agreements

Law360, New York (October 08, 2009) -- The Equal Employment Opportunity Commission recently issued a Q&A entitled, "Understanding Waivers of Discrimination Claims in Employee Severance Agreements."

Although the Q&A is designed to answer employee questions about severance agreements, it is a good primer for employers on the requirements for a legally compliant severance agreement.

One of the most important points made by the Q&A is the reminder that the validity of a severance agreement will be determined from the point of view of the employee, not the employer.

The question the courts will decide in a challenge to the validity of a severance agreement is not "what did the employer intend," but instead, "what would the average employee reasonably understand from the agreement."

Consequently, employers and their counsel need to review their agreements and make sure they are written in a manner that is clear enough that an average employee will understand the agreement and what it means. Questions an employer should consider are:

- Is the agreement unnecessarily complicated?
- Does it contain too much legalese?
- Are the sentences short and concise?

While these simple concepts are certainly not new, they bear repeating for, as the Q&A discloses, there are plenty of unwary employers whose severance agreements have been found by a court to be unenforceable because they were not sufficiently clear and understandable.

As one would expect from a document drafted by the EEOC, the Q&A prominently discusses an employee's right to file a charge with the EEOC even when he or she has signed an agreement containing a release of all claims.

This has been an enforcement focus for the EEOC, with suits brought against employers who offered severance agreements that purported to limit the employee's right to file a charge, or to participate or testify in any investigation conducted by the EEOC.

The Q&A is a good reminder to check your standard agreements to ensure they do not improperly limit these rights.

The Q&A is also a timely reminder that an employer may not simply stop making payments under a severance agreement when an employee brings suit challenging the validity of an agreement.

The EEOC specifically discusses the *Butcher v. Gerber Prods. Co.*[1] case from the Southern District of New York, which held that an employer could not cut off severance payments when employees filed suit challenging the validity of the waiver.

Employers should consult with legal counsel before they cut off severance payments to an individual who has challenged the validity of a release of legal claims.

The EEOC also provides an employee checklist entitled, "What To Do When Your Employer Offers You a Severance Agreement."

The checklist provides some basic advice to employees, including that they make sure they understand the agreement, check for deadlines and act promptly, have an attorney review the agreement, and understand what they are giving up.

It also instructs employees to go back to their employer if they do not understand any part of the agreement, or if they would like more time. Consequently, employers may face more questions from employees about what an agreement means and what its impact will be.

Employers will need to overcome their reluctance to discuss the impact of their agreement — a lesson IBM learned the hard way in *Thomforde v. Int'l Business Machines Corp.*[2]

In *Thomforde*, an employee was confused by language in the severance agreement and asked for clarification. The employer responded that it was not comfortable providing an interpretation and suggested the employee consult with an attorney.

The employee signed the agreement, collected the severance and then brought suit under the ADEA. The Eighth Circuit Court of Appeals concluded that the agreement

was not written in a manner calculated to be understood by the average employee, as demonstrated in part by the employee's question, and declared the agreement invalid.

Consequently, it would be prudent for employers to make sure that their agreement is clear and understandable, and to be ready to answer employee questions about the agreement.

While the information and advice contained in the Q&A is not necessarily new, it has never before been so easily available to employees. It is now prominently posted on the EEOC Web site. Employers should assume that resourceful employees will have access to this information.

Employers should review the Q&A and their standard severance agreements to ensure the agreements comply with the points discussed in the Q&A. If there appear to be discrepancies, employers should consult counsel before those discrepancies are brought up by employees.

The EEOC's Q&A provides a good road map of those basic principles that the EEOC contends must be present for a valid release of discrimination claims.

An employer seeking finality through a severance agreement would be well served by familiarizing itself with the EEOC's Q&A and taking steps to ensure that its own standard severance agreements comply with the Q&A.

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The opinions expressed are those of the author and do not necessarily reflect the views of Portfolio Media, publisher of Law360.

[1] 8 F. Supp. 2d (S.D.N.Y. 1998).

[2] 406 F.3d 500 (8th Cir. 1999).