

# PERSPECTIVES

Fall 2009

A periodic newsletter from the Labor & Employment Law Group at Dickinson, Mackaman, Tyler & Hagen, P.C.

## EEOC Guidance for Employees Regarding Severance Agreements

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The Equal Employment Opportunity Commission (“EEOC”) continues to attempt to educate employees about their rights. The latest effort is a document called “Understanding Waivers of Discrimination Claims in Employee Severance Agreements” (“Guidance”) released July 15, 2009. This Guidance is available on the Internet at [http://www.eeoc.gov/policy/docs/qanda\\_severance-agreements.html](http://www.eeoc.gov/policy/docs/qanda_severance-agreements.html). As more individuals lose their jobs in this poor economy, this site will no doubt become a popular destination for employees. It behooves employers to be familiar with what your employees will be reading with regard to Severance Agreements.

### Reminders for Employers

The Guidance does not change the law applicable to Severance Agreements, but provides a good, plain-language summary. While the Guidance is aimed at educating employees, it is a good reminder for employers, too—particularly on a few oft-forgotten nuances of the law. For instance:

- **EEOC Charges Cannot Be Released**

No matter how broad and all-encompassing a release in a Severance Agreement is written, it will not be interpreted to prohibit the filing of a charge of discrimination with the EEOC, nor will it be interpreted to prohibit someone from cooperating with the EEOC in its pursuit of a charge. These exceptions to releases may surprise some employers because many Severance Agreements do not specifically illuminate them. There are varying opinions among employment attorneys regarding whether releases should be explicit or silent with regard to these exceptions. Either approach is acceptable. Just remember, even though your release may be silent on these exceptions, they are implicit anyway, and language to the contrary is unenforceable if push comes to shove. Generally, an unenforceable provision of a Severance Agreement does not render the entire agreement null and void. Rather, the unenforceable words or provisions are considered invalid and cut from the Severance Agreement.

- **Consideration Periods Differ Depending on the Circumstances.**

The amendment of the Age Discrimination in Employment Act (“ADEA”) in 1990 by the Older Workers Benefit Protection Act (“OWBPA”) mandated minimum consideration periods for valid releases of ADEA claims. Some employers are unaware of the consideration periods altogether, and require employees to sign Severance Agreements on the spot without any time to think at all. Others inaccurately believe all employee releases must include a 21-day consideration period to be valid. Actually, at least three different consideration periods apply to releases of employment claims, and each is circumstance-dependent.

1. *One-Off Releases for Employees Under 40 = Reasonable Period*

Employees who are not yet 40 years old are not protected by the ADEA and OWBPA. If an under-40 employee is the only person being offered a Severance Agreement, then no particular time period for consideration of that offer must be provided. In general, however, any release must be “knowing and voluntary” to be enforceable. Therefore, even under-40 employees must be given **some** time to consider a Severance Agreement. Because there is no specific statutory minimum consideration period for an under-40, one-off Severance Agreement, our firm usually recommends providing a reasonable consideration period, which varies with the circumstances, and being flexible in extending that time if requested. The employer and employee may negotiate Agreements offered under these circumstances without concern for resetting the consideration period clock with each new offer.

2. *One-Off Releases of Employees 40 and Older = 21 Days*

Employees who are 40 years old and above are protected by the ADEA and OWBPA. If a 40+ employee is the only person being offered a Severance Agreement and a release of ADEA claims is included, then s/he must be given at least 21 days to consider the offer. The employer cannot ask or pressure the employee to sign such an agreement before the 21 days runs;

however, the employee may voluntarily sign the agreement any time during the 21 days. The employer and employee may negotiate agreements offered under these circumstances, with one caution. The consideration period clock starts on the date of the employer's **final** offer—unless the employer and employee agree not to re-start it. If you don't want to extend the consideration period more than 21 days, then language regarding a mutual agreement not to reset the clock should be included in the Severance Agreement to avoid this result.

### 3. *Releases of Multiple Employees, Regardless of Age = 45 Days*

When **more than one** employee is terminated at or around the same time, a group layoff has occurred and there are additional rules governing these kinds of Severance Agreements. Group layoffs may be due to (a) a voluntary exit incentive program that is offered to a group of employees for self-selection for termination, or (b) any other termination program that involves more than one employee (*e.g.*, reduction in force, reorganization, etc.). Severance Agreements offered as part of a group layoff require the employer to take additional steps in order to obtain valid waivers of ADEA claims, but many employers fail to take these additional and necessary steps. First, if any employee subject to the group layoff is 40 or older, and an ADEA release is included in the Severance Agreement, then every employee—regardless of age—must be given 45 days to consider the agreement. Second, Severance Agreements offered under these circumstances are non-negotiable, so there is no re-setting of the 45-day consideration period clock. Third, the severance pay and other contractual consideration offered in such Severance Agreements must be based on a standard formula that is communicated to the employees subject to the group layoff. Finally, an attachment must be added to the Severance Agreement that identifies the decisional unit(s) subject to the group layoff, a list of the position titles in the decisional unit(s), the ages of incumbents within the decisional unit(s), and which ones were selected for the layoff. No employee names should be included on this attachment. All of these additional steps are required when more than one employee is affected, and “more than one” is a very low threshold.

- **Provide Truthful Reasons for the Termination.**

Employers should provide accurate and truthful, albeit generic, reasons for terminations—particularly when a Severance Agreement is offered. This applies to both written and verbal communications about the reason for termination. As the Guidance reminds, courts have held Severance Agreements to be invalid due to fraud when employers give one reason for the termination up-front and a materially different reason for the termination after the Severance Agreement is signed. Employers should carefully communicate accurate termination reasons, and be consistent in such communications. Standard reasons for termination involving Severance Agreements include job elimination, reduction in force, temporary layoff, permanent layoff, reorganization, and restructuring. If performance played any part in who was chosen for such a termination, take additional care in how the termination reason is communicated. It may be advisable to also reveal the general factors considered in the termination decisions. For example, you may want to say that the termination is due to a RIF, and the factors considered included individual competencies, performance history, and time-in-position. Do not give specifics (*e.g.*, “your last performance rating was low”) or mislead (*e.g.*, “performance had nothing to do with this”).

## Cautions

- **Where the Guidance Goes Too Far**

While the Guidance is largely a good summary of the law, there are a couple of areas where the EEOC may have overstepped its jurisdictional boundaries. These are contained in the last bullet point of Appendix A of the Guidance, which lists claims the EEOC says cannot be waived/released in a Severance Agreement. The EEOC says claims under COBRA and ERISA cannot be waived; however, some types of COBRA and ERISA claims can be waived. COBRA and ERISA are laws regulated by the Department of

## UNEMPLOYMENT BENEFITS AND SEVERANCE PAY

Under Iowa's unemployment compensation laws, an individual is disqualified from receiving benefits in any week in which s/he also receives “wages in lieu of notice, separation allowance, severance pay, or dismissal pay.” In the past, there have been some inconsistent results from Iowa Workforce Development administrative law judges as to whether payments received under severance agreements would delay an individual's receipt of unemployment compensation benefits for the weeks when payment was received under such an agreement. Earlier this year a pattern of consistent results emerged, even from ALJ's who had previously ruled differently. The consensus opinion in Iowa now appears to be that a person can collect unemployment benefits even in weeks where s/he received other payment(s) from an employer, as long as those payment(s) are made in exchange for a release of legal claims—no matter what those payments are called. This appears to be based on an interpretation that such payment(s) are consideration for the release, and not the kind of wages or “severance pay” envisioned by the Iowa legislature in the statutory exclusion. Therefore, regardless of the terminology used, payments made to former employees under a severance or separation agreement provided in exchange for a release of claims will not delay or disqualify their ability to collect unemployment compensation benefits in Iowa.

Labor, not the EEOC. Also, the EEOC states in this bullet point that unemployment compensation benefits and workers' compensation benefits cannot be waived/released. Because such benefits are governed by state law, the EEOC's statement may not be accurate in every state. The EEOC is right, however, under Iowa law.

- **No "Form" Severance Agreements**

Much as employers would like it, there is no such thing as a **form** Severance Agreement. Applicable laws are constantly changing, and state law differences need to be accounted for with each Severance Agreement. A properly drafted Severance Agreement must be tailored so it is enforceable under the law of the state where the employee is located, and it must be up-to-date with the latest legal developments. Also, each termination scenario is different, and the Severance Agreement must speak to those unique circumstances. Failure to do so can result in cracks big enough to drive a truck through. If you go to the trouble and expense of offering severance pay, it is worth it to have an employment attorney draft, or at least review, the Severance Agreement. Employers feel cheated when severance is paid, but feel even more cheated when the protections expected under the Severance Agreement fail due to poor drafting or avoidable mistakes.

- **Legal Review of Termination Decisions and Documents**

End-of-employment decisions are the ultimate adverse employment actions, and as such, they carry significant legal risks. Employees may increasingly approach Severance Agreements with suspicion, caution, hesitation, and an eye toward negotiation because of the confidence the Guidance may give. This places further emphasis on the advantages of involving legal counsel competent in employment law to review termination decisions and draft/review Severance Agreements. Cutting corners at such a time may come back to haunt, especially now, as the Guidance improves employees' knowledge of their rights.

If you have questions regarding wrongful discharge claims, please contact a member of the Firm's [Employment and Labor Law Group](#) or the Dickinson attorney with whom you normally work.

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