How to "Waive" Good-Bye to More Employee Lawsuits

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As a result of recent market turmoil, there have been layoffs in many sectors, including at some of the nation's largest and historically stable institutions. In addition to the obligations to properly handle reductions in force, this combination of layoffs and the sluggish economy - which will leave many people unemployed for extended periods of time - will likely increase the number of employment-related lawsuits. Utilizing waivers to limit the timeframe in which an employee may file an employment-related claim can be an effective, yet inexpensive way, to reduce exposure to some types of employee lawsuits.

A waiver is the contractual relinquishment of a right or privilege and can be added to employment applications and other documents to require the initiation of most employment-related claims sooner than the expiration of the applicable statutory limitation. Properly drafted waivers can reduce the number of claims filed, the uncertainty surrounding whether a claim will be filed, and the inconvenience of defending suits filed several years after the employment action which gives rise to the claim.

Validity of Waivers

Courts typically enforce waivers that limit the timeframe in which an employee may file employment-related lawsuits. In fact, a Michigan District Court recently rejected an employee's challenge to a waiver that imposed a six month limitation period. *Steward v. DaimlerChrysler Corp.*, 533 F. Supp. 2d 717 (E.D. Mich. 2008).

In *Steward*, a former employee of the DaimlerChrysler Corporation (Chrysler) sued the company for race discrimination, intentional infliction of emotional distress, and violations of state and federal disability statutes. All of the claims were filed at least six months after the events giving rise to the claims. Chrysler moved for summary judgment on all counts, arguing that the waiver clause in the employment application precluded the claims. The clause in the employment application stated: *I agree that any claim or lawsuit relating to my service with Chrysler Corporation or any of its subsidiaries must be filed no more than six (6) months after the date of the employment action that is the subject of the claim or lawsuit. I waive any statute of limitations to the contrary*.

The court granted summary judgment in favor of Chrysler, finding that the waiver clause barred the claims.

The number of cases challenging waivers is limited, but the U.S. Court of Appeals for the Sixth and Seventh Circuits, and District Courts in Delaware, North Carolina, Missouri, Michigan, Ohio, Oregon, and Texas have upheld waivers limiting an employee's timeframe for filing employment-related claims.

Elements of a Valid Waiver

Courts who have addressed this issue, have enforced waivers which are "reasonable." A waiver is reasonable when (1) the employee has a sufficient opportunity to investigate the claim and file an action; (2) the time period is not so short to work as a practical abrogation of the employee's right to file a claim; and (3) the action is not barred before the employee's loss or damage can be ascertained. Limitation periods as short as six months can be reasonable.

Claims Limited by a Waiver

There is a limited body of case law addressing which employment-related claims can be time-barred by a waiver. As an example, 42 U.S.C. 1981 (Section 1981), the federal statute prohibiting race discrimination and retaliation, has a four year

statutory limitation period and no damage cap for emotional distress or punitive damages. Most state common law claims for breach of contract, negligence, intentional infliction of emotional distress, defamation, and other similar claims have equally long statutory limitation periods and limited or no caps on emotional distress or punitive damages. Courts have enforced waivers limiting the period to file Section 1981 claims and the aforementioned common law claims.

However, there is some uncertainty whether waivers can be used to limit the timeframe for filing compensation related claims under the Family and Medical Leave Act (FMLA), the Fair Labor Standards Act (FLSA), and the Equal Pay Act (EPA). All of these claims carry a two year limitation period, which can be extended to three years after a willful violation of the law. Federal appeals courts have not addressed whether the statutory limitation periods for FMLA, FLSA, and EPA claims can be contractually reduced. Additionally, district courts are split as to whether federal regulations that prohibit employers from interfering with employee's rights under FMLA prohibit the use of waivers to reduce the time limit for filing FMLA claims. Compare *Badgett v. Federal Express Corp.*, 378 F.Supp.2d 613 (M.D. N.C. 2005) (holding that six month waiver was enforceable to bar FMLA claim) with *Lewis v. Harper Hosp.*, 241 F. Supp. 2d 769 (E.D. Mich. 2002) (holding that six month waiver was not enforceable).

There is also some disagreement in federal courts regarding whether waiver clauses can bar claims for statutes enforced by the U.S. Equal Opportunity Commission (EEOC). The EEOC is charged with investigating and enforcing the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, and the Americans with Disabilities Act. Employees are prohibited from maintaining these claims in court until they have first exhausted all administrative remedies and received a right to sue letter from the EEOC. Given that this process often takes more than six months, at least one court has refused to enforce a shorter waiver period. *Salisbury v. Art Van Furniture*, 938 F. Supp. 435 (W.D. Mich. 1996) (stating that the six month waiver period effected a "practical abortion" of the right to file an EEOC claim). However, the Seventh Circuit has taken the view that the EEOC administrative process should not prohibit waivers from being enforced. *Taylor v. Western & Southern Life Insurance Co.*, 966 F.2d 1188 (7th Cir. 1992) (stating that employee could have filed suit and asked for a stay pending the receipt of EEOC right to sue letter). Additionally, in the *Steward* case, discussed above, the court enforced a waiver when the right to sue letter was received before the end of the waiver period.

Implementing Waiver Provisions

Given the uncertainty as to the enforceability of waivers, employers should take steps to make the waiver language and provision as clear and reasonable as possible.

The Waiver Should be Conspicuous.

Regardless of whether the waiver is contained in an employment application or another stand-alone document, it is imperative to make the waiver conspicuous. If the waiver is "buried in the fine print," there is a risk a court will disregard the waiver on the grounds that the employee did not knowingly and voluntarily agree to the abbreviated limitation period. Highlighting the waiver can be accomplished by using bold, italic or enlarged font, capital letters, and headings that draw attention to the waiver. Additionally, the waiver should clearly and explicitly state the time period allowed for filing a claim, and explain that such period may be less than what is permitted by statute. Requiring a signature acknowledging understanding and agreement of the waiver can also assist in rebutting later assertions by an employee that the waiver was not read or understood.

Adequate Consideration.

It is possible for a court to void a waiver for lack of consideration. This does not typically present a problem for waivers in an employment application, but can be an issue when current employees are asked to sign a waiver. Whether offering continued employment alone constitutes adequate consideration depends on the applicable state law. In some cases, the length of time the employee is subsequently employed before filing a claim against the employer may be a factor negating a waiver for lack of consideration. To avoid any uncertainty, employees should consider offering a small monetary payment or other benefit as additional consideration, particularly when the waiver is signed after the employee is hired.

Bottom Line for Employers

Waivers can be an efficient way to reduce exposure to employment related lawsuits. Given the limited use of waivers to date, unsurprisingly, there is a limited body of case law addressing to the enforceability of waivers which limit the time an employee has to file suit. However, courts which have vetted the issue have enforced reasonable waivers limiting the time period to bring federal and common law claims, and some courts have applied waivers to bar FMLA and EEOC claims. Therefore, adding reasonable waiver provisions to employment applications and other employment-related documents could be an effective way to limit an employer's potential exposure.