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Client Alert

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Ninth Circuit Nullifies Release Based On OWBPA/ADEA Language

In *Syverson v. International Business Machines Corp. (IBM)*, 2006 WL 2506421 (9th Cir. Aug. 31, 2006), the U.S. Court of Appeals for the Ninth Circuit concluded that a waiver agreement prepared by IBM was unenforceable because it was not entered into knowingly and voluntarily by IBM employees in violation of the Older Workers Benefits Protection Act (OWBPA). Under the OWBPA, a waiver agreement will not operate to waive an employee's rights or claims arising under the Federal Age Discrimination in Employment Act ("ADEA") unless it is "'written in a manner calculated to be understood' by the average employee eligible to participate in the agreement." 29 U.S.C. § 626(f)(1) (2000). ADEA regulations also prohibit any covenant not to sue or release that penalizes an employee who pursues an ADEA claim. 29 CFR §1625.23(b). In this case, IBM attempted to comply with both the OWBPA and ADEA regulations by drafting a release that expressly waived employees' ADEA claims but at the same time expressly excluded ADEA claims from the covenant not to sue, which required employees to pay IBM's defense costs if they filed suit. The Ninth Circuit concluded that the carve-out language in the covenant not to sue engendered confusion over whether employees' claims were in fact covered by the release or exempted from it.

Factual Background and Terms of Agreement

IBM initiated a reduction in its work force in 2001. As part of that reduction in work force, IBM offered each employee selected for termination a severance package in exchange for the signing of a lengthy agreement called a General Release and Covenant Not to Sue ("Agreement"). Several employees who signed the Agreement filed a lawsuit claiming that IBM's layoff program violated the ADEA. The employees claimed the Agreement did not bar their age discrimination claims because the Agreement did not comply with the OWBPA's requirements that an ADEA waiver be made knowingly and voluntarily. More specifically, they claimed that the phrasing of the Agreement was confusing and led employees to believe that they still retained the right to pursue an ADEA claim.

IBM's Agreement contained standard language releasing "all claims, demands, actions or liabilities you may have against IBM of whatever kind including, but not limited to, those that are related to your employment with IBM . . ." The Agreement expressly stated that "this Release covers, but is not limited to, claims arising from the [ADEA]."

The Agreement also contained a covenant not to sue provision. The covenant not to sue provided that each employee agreed to "never institute a claim of any kind against IBM" and that if an employee did so he or she would "pay all costs and expenses of defending against the suit incurred by IBM . . . ." However, the covenant not to sue portion of the release contained an exception which stated that "This covenant not to sue does not apply to actions based solely under the [ADEA], as amended. That means that if you were to sue IBM . . . only under the [ADEA], as amended, you would not be liable under the terms of this Release for their attorney's fees and other costs and expenses of defending against the suit." IBM included this provision in an attempt to comply with ADEA regulations that provide that "No ADEA waiver agreement, covenant not to sue, or other equivalent arrangement may impose any condition precedent, any penalty, or any other limitation adversely affecting any individual's right to challenge the agreement . . . [including] provisions allowing employers to recover attorneys' fees and/or damages because of the filing of an ADEA suit." 29 CFR §1625.23(b).

The District Court for the Northern District of California dismissed the claim, relying in part on a decision from the District Court in Minnesota which upheld the same exact language. *See Thomforde v. International Business Machines Corp.*, 304 F. Supp.2d 1143 (D. Minn. 2004). While the California case was on appeal, the Eighth Circuit reversed Thomforde, holding that the release language "is not written in a manner calculated to be understood by the intended participants as required by the OWBPA." *Thomforde v. Int'l Bus. Machs. Corp.*, 406 F.3d 500, 504 (8th Cir. 2005).

The Ninth Circuit's Decision

The Ninth Circuit Court of Appeals agreed with the plaintiffs that employees signing the Agreement could easily be confused by the Agreement which first waived all ADEA claims in the release but then appeared in the covenant not to sue provision to retain that right for employees. The court noted that a reasonable person could interpret the release language to release all claims, including those under the ADEA, but interpret the language in the covenant not to sue provision to preserve the right of employees to pursue an ADEA claim so long as it is the only basis for the lawsuit. The court added that an employee could also reasonably believe that the language under the covenant not to sue retained all rights for employees to pursue an ADEA claim thereby exempting ADEA claims not only from the covenant not to sue but also the release. Because it interpreted the Agreement to be confusing, the court concluded that the Agreement did not satisfy the OWBPA requirement that a waiver agreement be "written in a manner calculated to be understood . . . by the average" employee signing the agreement. 29 U.S.C. § 626(f)(1)(A).

IBM defended that the language of the covenant not to sue was intended simply to preserve the right of employees to challenge without penalty the validity of the release itself, rather than to preserve the right to pursue an ADEA claim. Although the court acknowledged that the language of the release and that of the covenant not to sue served separate and different functions, it questioned whether employees would be able to distinguish the difference. The court observed that the distinction between the release and the covenant not to sue was blurred by the fact that the two were included in a single document. In addition, the terms "release" and "covenant not to sue" were used interchangeably in the provision containing the covenant not to sue. And throughout the other portions of the Agreement, both provisions were referred to in shorthand as the "Release."

The court noted that if it was IBM's intention to preserve merely the right to challenge the Agreement itself, it could have done so expressly. First, the court underscored the importance of drafting waiver agreements in plain and simple language. In this case, the term "covenant not to sue" would have been unfamiliar to the employees signing the Agreement. Second, the Agreement should have explained either the relationship between the release and the covenant not to sue, or the limited nature of the exception to the covenant not to sue in light of the release of claims. Instead, the release language merely indicated that "this covenant not to sue does not apply to actions based solely under the [ADEA]." The court noted that this language coupled with the use of the unfamiliar terminology might reasonably have appeared to lift any and all barriers to pursuing an ADEA claim.

IBM also defended that the language of the Agreement itself encouraged participating employees to consult an attorney to the extent that they needed clarification. Although the court acknowledged that IBM was required to do so as a separate requirement under 29 U.S.C. § 626(f)(1)(E), the Agreement's direction to seek legal advice did not satisfy the "manner calculated" requirement. The court held that the language of the Agreement itself must be easily understood. Because it was not clear and unambiguous, the court concluded that it was not entered into knowingly and voluntarily in violation of the OWBPA and was therefore unenforceable.

Implications for Employers

Although most of the ground rules regarding ADEA waiver agreements still apply, the Ninth Circuit's more exacting approach in *Syverson* highlights the importance that such agreements be written in a manner that would reasonably be understood by an average employee. As such, employers would be well advised to ensure that their waiver agreements are clear and unambiguous. As has always been the case, waiver agreements should be written in plain language and be free of technical and/or legal jargon and long, complex sentences.

What is new about *Syverson* is that the court specifically underscores the importance of clarifying the relationship between a release and covenant not to sue. After *Syverson*, if a waiver agreement includes both a release and covenant not to sue, the agreement should clearly and expressly describe the limited exception provided by the covenant not to sue. The provision containing the covenant not to sue must indicate that it does not preserve an employee's right to pursue an ADEA claim, but merely allows an employee to challenge the waiver of the ADEA claim without fear of penalty, including the requirement that the employee pay the employer's costs of defending a potential lawsuit. Following the court's suggestion in *Syverson*, it may also be advisable, in the interest of clarity, to include the release and covenant not to sue in separate documents. At minimum, however, waiver agreements should not refer to these provisions interchangeably and should clearly indicate the purpose of each and their relationship to each other.

It is also important that employers continue to comply with the requirements of the ADEA regulations. See 29 C.F.R. §1625 *et seq*. Among other things, it is important to note that the language of a waiver agreement itself must expressly waive all potential ADEA claims and advise employees to seek legal advice in connection with the waiver agreement. Furthermore, an employer must provide an employee at least 21 days to consider the waiver agreement and a right to revoke the agreement for at least seven days after signing. A waiver agreement may not purport to penalize an employee for pursuing an ADEA claim by, for example, requiring an employee to pay an employer's defense costs or return severance pay. Likewise, a waiver agreement may not operate to waive future rights or claims arising after the agreement is signed. These are but a few of the requirements all employers need to ensure are met in general release documents. If you are uncertain as to whether your waiver agreements are in compliance with the detailed ADEA regulations governing waiver agreements, you should consult legal counsel.

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