EMPLOYMENT RELATIONS

Update

Employment

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Poorly-drafted Severance Agreements Can Cost You More Than You Expect

Many employers when faced with potential employment claims often elect to resolve them amicably by providing additional severance in exchange for a release of those claims. As recognized in a decision from the Maryland District Court, a poorly-drafted severance agreement can prove to be a very expensive mistake.

Background Facts

Nucletron, the employer, provides severance pay to eligible employees whose employment is terminated for reasons that are not prejudicial to Nucletron. Nucletron requires its employees to sign a severance agreement upon their termination in order to receive severance benefits.

The agreement requires that the employee waive his rights under several employment statutes, including the Age Discrimination In Employment Act (ADEA), Title VII of the Civil Rights Act (Title VII) and the Equal Pay Act of 1963 (EPA). The agreement also requires the employee to promise to neither to file a charge with any federal agency, nor to participate in any such action.

If an employee files or participates in such a charge, the agreement gives Nucletron the right to recover the severance payment, liquidated damages and attorneys' fees. In exchange for the release, Nucletron provides the employee a severance payment and a period of continued employment at a reduced work schedule.

In December 2005, Nucletron informed employee Peter Dove that it intended to terminate his employment. In March 2006, Nucletron offered Dove its standard severance agreement. Dove retained counsel who wrote Nucletron claiming that Dove's termination constituted discrimination under ADEA. Dove, indicated, however, that he was willing to sign the severance agreement if Nucletron increased the severance payment. Nucletron refused, Dove was terminated, and no severance benefits were provided.

Thereafter, Dove filed a charge with the EEOC claiming that Nucletron had terminated him because of his age in violation of ADEA. Finding reasonable cause, the EEOC then filed the lawsuit against Nucletron on Dove's behalf.

According to the EEOC, Nucletron offered the severance agreement to 11 employees aside from Dove. Each of those employees signed the agreement and received severance benefits. However, according to the EEOC, Nucletron retaliated against Dove based on his requirement that Dove sign Nucletron's standard severance agreement to obtain severance benefits.

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The EEOC maintained that such action is retaliatory on two theories: (1) Nucletron's policy of conditioning the award of severance benefits upon the terminated employee's agreement not to file a discrimination charge or to participate in proceedings before the EEOC constitutes "facial retaliation," and, (2) Nucletron retaliated against Dove for engaging in a protected activity by denying him severance benefits.

Nucletron moved to dismiss the EEOC's retaliation claim arguing that it is insufficient as a matter of law. The EEOC, in turn, moved for partial summary judgment on that claim.

Court's Decision

According to the court, an employer can offer its employee additional severance benefits not already promised or owed in exchange for the employee's promise not to file a discrimination lawsuit or for a waiver or release of his discrimination claims. An employee may not, however, waive his or her right to file a charge with the EEOC or participate in an EEOC discrimination proceeding.

Even if the employer offers a severance agreement with an invalid waiver, however, the employer only commits retaliation if it either attempts to enforce the agreement against the employee who signed the agreement, but, nevertheless, files or participates in an EEOC charge, or withholds benefits already promised or owed from an employee who refuses to sign the agreement.

According to the court, if Nucletron revoked benefits that were part of the severance package promised to all terminated employees because Dove refused to waive his rights, the EEOC's retaliation claim would succeed. If, however, Nucletron offered Dove an additional payment not otherwise promised or owed, then the EEOC's claim would fail.

With regard to the EEOC's first claim, that Nucletron's policy of conditioning the award of severance benefits on the terminated employee's agreement not to file a discrimination charge or participate in proceedings before the EEOC, constitutes "facial retaliation," the court disagreed. While that portion of the severance agreement that requires an employee to waive his right to file or participate in an EEOC discrimination charge is unenforceable and cannot be waived, the mere offer of any unenforceable severance agreement, according to the court, does not constitute a separate basis for retaliation under Title VII, ADEA or the EPA.

In reaching this conclusion, the trial court relied on a decision from the Sixth Circuit Court of Appeals that found that a mere offer of an unenforceable severance agreement does not constitute retaliation. According to the court, to have committed actionable retaliation, the employer must have taken a sufficiently adverse employment action toward the employee, such as a denial of severance benefits or instituting a suit to enforce the severance agreement.

As to the EEOC's second theory that Nucletron retaliated against Dove by denying him severance benefits that were promised or owed to all terminated employees because he refused to relinquish his claims under the employment statutes, the court found that such actions, if proven, could constitute retaliation. As the court noted, in the context of retaliation claim, an adverse employment action is any action that well might have persuaded a reasonable worker from making or supporting a charge of discrimination.

While it is clear that an employer may offer an additional severance payment in exchange for release of any claims under the retaliation statutes and the promise not to file suit against the employer, it is equally clear that an employer may not withhold standard employee benefits because an employee has refused to waive his rights under the antidiscrimination statutes.

As the court observed, if the EEOC can prove that Nucletron provided the payment offered in the severance agreement as a matter of course to all terminated employees, then it can establish the second element of its claim. If, however, the severance payment is a benefit over and above what is promised to employees generally, then the EEOC's retaliation claim would probably fail.

In addition to seeking individual relief, the EEOC also requested that the court grant injunctive relief against Nucletron, prohibiting it from attempting to enforce the invalid portions of the standard severance agreement against the 11 employees who signed it. According to the court, the invalid provisions violated the Older Workers Benefits Protection Act (OWBPA) as they prohibited employees from filing or participating in an EEOC charge.

Moreover, if Nucletron were to bring a breach of contract suit against an employee who signed the severance agreement, but, nevertheless, filed a charge with the EEOC, such an action would also constitute retaliation. To prevent the possible enforcement of the invalid provision in Nucletron's standard severance agreement, the court found that an injunction was appropriate.

Bottom Line

Every Maryland employer who uses severance agreements as a way of amicably resolving potential employment claims, should make sure that the severance agreement it uses fully complies with applicable law. As noted in this decision, a severance agreement that purports to prevent an employee from filing a claim with the EEOC or otherwise participating in an EEOC investigation is invalid and should be removed from the standard severance agreement.

Moreover, as the court discussed, if an employer has a standard practice of offering certain severance benefits to all employees who are terminated, then in those situations in which the employee is being requested to sign a waiver and release of claims, then additional severance benefits should be offered to obtain the full release.

To do otherwise, could be construed as retaliatory, as in this case, or could be attacked on the grounds that the severance agreement is unenforceable because there was inadequate legal consideration. In either event, the employer could lose the protection of the release — the very benefit that the severance agreement is designed to provide. *Equal Employment Opportunity Commission v. Nucletron Corporation,* D.C. Md., Civil Action No. L-07-2644, July 2, 2008.)

Kevin C. McCormick

Fourth Circuit Closes Out Bank Officer's Account

The U.S. Court of Appeals for the Fourth Circuit effectively closed out the employment account of a bank officer finding that his claim of wrongful discharge was preempted by the National Bank Act (NBA).

Background Facts

Eugene Schweikert worked for the Bank of America, N.A. (Bank) as a private client manager in the private banking section in the bank's Chevy Chase, Maryland, office. At the time of his termination, Schweikert's title was senior vice president. Schweikert helped a female client of the Bank arrange several loans. When he received a telephone call from a caller who claimed to be an FBI agent, Schweikert declined to divulge the female client's financial records.

On or about April 1, 2005, Schweikert's employment was terminated because of poor judgment and his alleged failure to cooperate with Bank internal and external investigations.

The Bank's board of directors ratified Schweikert's termination from employment in its August 2, 2005, meeting. The minutes from the meeting included a general reference to "officer separations." Schweikert was included on the officer separations list.

Schweikert filed a lawsuit against the Bank in Maryland state court alleging wrongful discharge. The Bank removed the matter to the United States District Court for the District of Maryland on diversity grounds and then moved to dismiss the complaint asserting that Schweikert's claim was preempted by the "at pleasure" provision of the NBA.

The District Court granted the Bank's motion to dismiss finding that the "at pleasure" provision of the Act precluded state common law wrongful discharge claims. Unhappy with that result, Schweikert appealed to the Fourth Circuit.

In considering Schweikert's claim, the Fourth Circuit reviewed the NBA, which provides that national banks have the power to elect or appoint directors and by board of directors to appoint a president, vice president, cashier, or other officers, define their duties, require bonds of them, and fix the penalty thereof, dismiss such officers or any of them "at pleasure" and appoint others to fill their places.

Prior court decisions have interpreted the "at pleasure" provision of the NBA as preempting state law claims concerning wrongful termination, as in the instant matter.

With regard to Schweikert's claim that the NBA was not properly followed in this case, the court, again, found to the contrary. According to the court, to invoke the protection of the "at pleasure" provision, a national banking association's board of directors must take action to dismiss a bank officer. Schweikert claimed that he was not an "officer" of the bank within the meaning of the NBA, and that he was not dismissed "by" the board. Neither claim was successful.

According to the court, other decisions interpreting the "at pleasure" provision have concluded that persons holding comparable positions, as did Schweikert, were considered officers under the NBA (executive vice president) (vice president and others serving as branch managers). When deciding this issue, the court noted that it must remain cognizant of the purpose of the "at pleasure" provision of the NBA – to place the fullest responsibility upon the directors by giving them the right to discharge such officers "at pleasure."

The court also noted that the NBA was broadly written and, when naming the officers who may be discharged "at pleasure," did not include restrictive words such as "top," "operating," "senior," or "executive."

According to the court, Schweikert was a senior vice president of the Bank, earning a salary of $135,000. His appointment to the position of senior vice president was approved by the Bank's board when he was initially hired in 2004. Accordingly, the District Court was correct in concluding that Schweikert was an officer of the Bank within the meaning of the NBA.

With regard to Schweikert's second argument that the board's dismissal power is non-delegable and, therefore, the board's ratification of Schweikert's termination was ineffective, the court also rejected this claim, as well.

According to the Fourth Circuit, the ratification by the Bank's board of Schweikert's termination, which occurred earlier, was sufficient to invoke the preemptive effect of the "at pleasure" provision of the NBA. Any action recorded in the minutes of a board of directors is an action taken by that board. The fact that the board action took place on August 2, 2005, a few months following Schweikert's April termination, did not diminish the board's authority to exercise its discretion with respect to Schweikert and ratify his termination. (*Eugene Schweikert v. Bank of America, N.A.,* U.S. Court of Appeals, 4th Circuit, Docket No. 06-2137 (April 1, 2008).

Kevin C. McCormick

Think Before You Type

Courts and parties involved in litigation are placing an increased emphasis on e-mails and other electronically stored information in the wake of amendments to the Federal Rules of Civil Procedure regarding the discovery of electronically stored information and similar rules adopted (or being considered for adoption) by several states.

What does this mean for employers?

E-mail is quickly becoming the preferred means of communication. When litigation arises, parties often recognize that the informal nature of e-mail makes it a potential goldmine for potentially damaging communications. You should expect that e-mails will be the subject of discovery requests in litigation or a regulatory investigation. Not only will the contents of some e-mails be featured when brought to light during discovery or at trial, but failure to preserve the e-mail and other electronically stored information can result in the imposition of sanctions, including monetary penalties, instructions to the jury that they should assume the missing document was unfavorable to the party, and dismissal of a claim. There are various ways to minimize the risks associated with discovery of e-mails.

What steps can you take to minimize risks before a document is created?

Advising employees not to use e-mail is impractical. E-mail is commonplace in most companies, but there are a number of steps that can be taken to lessen the possibility of damaging communications at the outset:

Consider alternative means for communication. Your organization can avoid the risks associated with a damaging e-mail coming to light by not sending an e-mail under certain circumstances. For example, if an issue is sensitive, consider picking up the phone or having a face-to-face meeting. It will prevent a damaging record from being created in the first place.

Take time to cool off. If the message pertains to a particularly "heated" topic, consider imposing a "cooling-off" period before responding to an e-mail. Take time to think about what you want to say and how to respond in a manner that will not be damaging if the e-mail becomes a poster-size exhibit in a courtroom.

Consider the content. Because a party will almost inevitably have access to your organization's (or your personal) e-mails through discovery, it is important to consider what you type. Rephrase e-mails when necessary. Have someone who is objective review an e-mail, if necessary.

What can you do to manage the records once created?

Because the use of e-mails does not appear to be ending any time soon, your organization should consider what can be done to manage the records:

Implement a records management policy. Consider implementing a policy to govern the retention and destruction of e-mails and other types of documents. This policy should be sent to each employee. Apply the policy consistently. Every records management policy should include a retention schedule with a list of the categories of documents generated and how long the records will be retained. Retention schedules must be followed consistently because having selectively enforcing a policy is worse than having no policy at all.

Include a "legal-hold" provision. Develop a policy that includes a process for implementation of a "legal hold" to preserve documents if litigation, a regulatory investigation, or any other situation triggering a preservation obligation is reasonably anticipated. Once someone becomes aware of or reasonably anticipates litigation or some event requiring preservation of records, there is a duty to preserve documents regardless of format. This is important because many e-mail systems include a feature that systematically deletes information after the lapse of a specific amount of time. These types of systems must be suspended when a "legal hold" is implemented, or your organization faces the risk of sanctions.

Conclusion

E-mails are increasingly becoming the subject of requests in connection with litigation and regulatory investigations. Although there are several risks associated with e-mails coming to light, the risks can be minimized by taking a few simple steps to prevent damaging e-mails from being created. The risks of damaging e-mails coming to light can also be reduced by implementing a records management policy that governs the company's e-mails and other records. And, don't forget: think before you type!

For more information, please contact Dennis Robinson by e-mail at drobinson@wtplaw.com or phone at 410.347.8797.

Dennis M. Robinson, Jr.

On-Call Policies: How to Use Them Correctly & Reduce Labor Costs

In today's tough financial times, companies throughout our area are struggling to control or reduce their fixed costs and overhead. A large part of this effort is a reduction in labor costs. While layoffs are inevitable for some, others attempt avoid the need for such a drastic step by making their workforces work more efficiently and reducing unnecessary expenditures on overtime and unnecessary staffing during slow or idle time periods. And they have turned to technology in order to make all of this work while still meeting the needs of their clients. Pagers, PDAs and mobile telephones, allow companies to respond to clients' needs while reducing hourly wage costs. By placing employees on call rather than maintaining staff in the office, they can reduce the amount compensable time.

Is this as easy as it sounds? Absolutely not. On-call policies are fraught with potential wage and hour pitfalls. If designed incorrectly, they can lead to claims for unpaid wages, as well as civil penalties under the Fair Labor Standards Act (FLSA).

The FLSA provides that non-exempt employees must be paid at least minimum wage for all time worked on behalf of their employers (whether or not those hours were requested or even approved) up to 40 hours per week, and 1.5 times the "regular rate" for time over 40 hours. It may sound simple, but in contexts such this, it can be quite complex. What is compensable and what is not can be tricky. Clearly, any and all time spent actually responding to call must be compensated. To accomplish this, employees must be required to keep careful track of their time. Any time spent over 40 hours gets paid at the overtime rate and if a lump sum is paid to employees as compensation for taking on-call duty, that amount must be factored into the regular rate in order to properly determine the amount of overtime.

Beyond these basic principles, the more difficult issue is whether the time spent on call, but not actually responding to calls is compensable. Even when employees are not required to stay at work, the time may be considered working time. The relevant inquiry here is whether the employee is "waiting to be engaged" or "engaged to wait." The Department of Labor looks at whether the wait predominately benefits the employer or if the employee is able to use the time for his or her own purposes. The time will be compensable when "the conditions placed on the employee's activities are so restrictive that the employee cannot use the time efficiently for personal pursuits."

Based upon this distinction, here are some best practices to follow when drafting an on-call policy:

- Do not unduly restrict the physical location or activities of employees on call. They should not be required to stay on site or at home, though you can require that they remain in a condition to perform work (i.e., sober).
- Make sure that the calls are not so frequent that they are essentially chained to the telephone.
- Provide a reasonable amount of time for them to call back in. 20 minutes is ok, though I would not push it too far past that.
- Post the on-call schedule, allowing substantial notice to the employees and rotate the schedule. It is also advisable to permit employees trade with others.
- Do not put employees on 24-hour, 7-days per week call.
- Be careful with discipline for violations of the policy. Certainly discipline outright or repeated violations, but discipline for minor infractions may mitigate against your position that the time is not compensable.
- Have the policy in writing, with all elements well defined and explicitly stated.

Applying these principles, you can steer clear of wage and hour quagmires and properly employ on-call employees while reducing your labor expenditures.

Erin Lewis Roberts

Economic Stimulus Act—Impact on COBRA Health Continuation Coverage: Frequently Asked Questions

When President Obama signed the American Recovery and Reinvestment Act of 2009, one provision that received relatively little publicity is a subsidy for former employees and their dependents who elected, or were offered the opportunity to elect, to continue health insurance coverage following termination of employment. The following are some FAQs about the new requirements.

Who is eligible for the subsidy?
Former employees or dependents of former employees (collectively, "qualified beneficiaries") who lost or will lose coverage under a group health plan between September 1, 2008, and December 31, 2009, as a result of an involuntary termination of employment with the employer sponsoring the group health plan.

To which group plans does the subsidy apply?
The subsidy applies only to group health plans. COBRA premium payments for flexible spending plans are not eligible for the subsidy.

What is the amount of the subsidy?
Qualified beneficiaries who are eligible for the subsidy are required to pay 35% of the required COBRA premium.

How long does the subsidy last?
The subsidy lasts for nine months. However, the subsidy will end if the qualified beneficiary is eligible for coverage under another comparable group health plan or Medicare. The qualified beneficiary does not have to actually become covered under the group health plan or Medicare – simply being eligible for coverage is sufficient to end the subsidy.

Does the subsidy extend the amount of time a qualified beneficiary will be eligible to continue coverage?
No. COBRA coverage still ends on the statutory termination date –18, 29 or 36 months following loss of coverage, depending on the event causing the loss of coverage.

Does the employer receive a credit for the subsidy?
Yes. The employer providing the subsidy will receive a credit against its payroll taxes for the amount of any subsidies provided to eligible individuals.

When is the subsidy effective?
Eligible individuals are entitled to the subsidy for the first period of coverage following enactment of the Economic Stimulus Act – typically, March 1, 2009. The Act includes a 60-day grace period to provide updated notices.

What are the notice requirements imposed on employers?
Employers must update their COBRA election forms to include information regarding the subsidy or provide an additional form or notice describing the subsidy.

What about otherwise qualified beneficiaries who did not previously elect continuation coverage?
An individual who loses coverage because an employee was involuntarily terminated on or after September 1, 2008 must be notified of the option to continue coverage with the subsidy.

Is the subsidy taxable to the recipient?
Generally, no.

Are there income limits on qualified beneficiaries on exclusion of the subsidy from gross income?
Yes. The tax free aspect of the subsidy phases out for individuals with adjusted gross income of $125,000 or more ($250,000 for joint filers) with a complete phase out for individuals earning $145,000 ($290,000 for joint filers). These individuals may elect to waive the subsidy.

Mary Claire Chesshire

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