Employee Severance Agreements

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Employee Severance Agreements: Case Law Trends

- Importance of Finality
- Release as Deterrent
- Is signing on the dotted line enough?

Employee Severance Agreements: Case Law Trends

1. Underlying Principles
2. Title VII, EPA, ADA, Rehab Act, Section 1981, ERISA
3. ADEA Claims
4. Filing/Participating in Charge
5. WARN Act

Employee Severance Agreements: Case Law Trends

1. Underlying Principles
   - consideration
   - offer/acceptance
   - duress, mistake, other defenses
   - affirmative defense
   - burden of proof

Employee Severance Agreements: Case Law Trends

2. Title VII, Equal Pay Act, Rehabilitation Act, ADA, Section 1981, ERISA
   - knowing and voluntary test
   - *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974)
   - Note similarities in substantive issues as between Title VII and ADEA

"Knowing and Voluntary"

- clear language
- consideration
- time to read
- advise to consult with attorney
- education
- business experience
- actually read and consider?
- actually consult?

1st	*Hernandez v. Philip Morris USA, Inc,* 486 F.3d 1, 8 (1st. Cir. 2007) (release of Title VII claims)
3d	*W.B. v. Matula,* 67 F.3d 484, 497 (3d Cir. 1995) (release of Rehabilitation Act claims)
5th	*Chaplin v. Nations Credit Corp.,* 307 F.3d 368, 373 (5th Cir. 2002) (release of ERISA claims)
7th	*Wagner v. Nutrasweet Co..,* 95 F.3d 527, 532 (7th Cir. 1996) (release of Equal Pay Act claims)
10th	*Torrez v. Public Service Co.,* 908 F.2d 687, 689 (10th Cir. 1990) (release of 42 U.S.C. § 1981 claims)

Objective vs. Subjective Standard

- Daniel P. O'Gorman, *A State of Disarray: The "Knowing and Voluntary" Standard for Releasing Claims Under Title VII of the Civil Rights Act of 1964*, 8 U. Pa. J. Lab. & Emp. L. 73 (2005)
  - Thesis: While an agreement to release Title VII claims might not require the application of the objective theory of contracts like a contract in a commercial transaction, it also does not require application of the "voluntary, knowing, and intelligent" constitutional waiver standard.
- Craig Robert Senn, *Knowing and Voluntary Waivers of Federal Employment Claims: Replacing the Totality of Circumstances Test with a "Waiver Certainty" Test*, 58 Fla. L. Rev. 305 (2006)
  - Thesis: Due to the totality test's shortcomings and problematic consequences for employers, employees, and the courts, a new and reformed analysis is needed to determine whether a waiver of non-ADEA federal employment claims is knowing and voluntary.

Objective vs. Subjective Standard

- *Parsons v. Pioneer Seed Hi-Bred Int'l, Inc.,* 447 F.3d 1102, 1104 (8th Cir. 2006) (district court should not have relied upon employee's subjective state of mind when determining whether release agreement was valid)

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3. ADEA Claims

- knowing and voluntary test is set by the OWBPA (29 USC § 626(f))
- statutory factors supplemented by EEOC (29 CFR § 1625.22)
- rationale: older workers may have difficulty returning to work

OWBPA is a Floor, Not a Ceiling

11th *Griffin v. Kraft General Foods, Inc.*, 62 F.3d 368, 371-73 (11th Cir. 1995) (OWBPA sets forth minimum requirements; totality of the circumstances must still be considered)

10th *Bennet v. Coors*, 189 F.3d 1221, 1230 (10th Cir. 1999) (OWBPA compliance is required, coupled with an assessment of totality of the circumstances)

3rd *Wastak v. Lehigh Valley Health Network*, 342 F.3d 281, 283 (3d Cir. 2003) (OWBPA sets the minimum requirements, and pre-existing totality-of-the-circumstances test also applies)

9th *Syverson v. IBM*, 472 F.3d 1072, 1075-76 (9th Cir. 2007) (employer must meet statutory requirements as well as knowing and voluntary standard)

Notable OWBPA Cases

Raczak v. Ameritech Corp., 103 F.3d 1257 (6th Cir. 1997) (varying potential labels to use as "job title" for group termination disclosures should be resolved by focusing on "understandability" to workers)

American Airlines, Inc. v. Cardoza-Rodriguez, 133 F.3d 111 (1st Cir. 1998) (the phrase "I have had reasonable and sufficient time and opportunity to consult with an independent legal representative" insufficient)

Cole v. Gaming Entertainment, L.L.C., 199 F.Supp.2d 208 (D. Del 2002) (the phrase "[e]mployee acknowledges that he/she has been advised to consult with an attorney" is insufficient under OWBPA)

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3. ADEA Claims
   - decisional unit
   - covenants not to sue
   - invalid waiver itself actionable?

Decisional Unit

"[T]hat portion of the employer's organizational structure from which the employer chose the persons who would be offered consideration for the signing of a waiver and those who would not be offered consideration for the signing of a waiver." (29 CFR § 1625.22(f)(3))

Kruchowski v. Weyerhaeuser Co., 446 F.3d 1090 (10th Cir. 2006) (inaccurate identification of decisional unit renders ADEA releases invalid)

Decisional Unit -- Examples

(A) Ten percent of the employees in the Springfield facility will be terminated.

(B) Fifteen Computer Division employees will be terminated.

(C) Half of the Keyboard Department of the Computer Division will be terminated.

(D) Ten percent of employees reporting to the VP for Sales, wherever located, will be terminated.

(E) Ten percent of all accountants, wherever located, will be terminated.

Covenants Not to Sue

Release	Covenant
- Affirmative Defense (FRCP 8) - No counterclaim - No fees/recovery	- Offense - Counterclaim - Fees/recovery

Covenants Not to Sue

- Black's Law Dictionary, 8th ed. (2004)
  - "Covenant not to Sue"
    - A covenant in which a party having a right of action agrees not to assert that right in litigation.
  - "Release"
    - The act of giving up a right or claim to the person against whom it could have been enforced; the relinquishment or concession of a right, title, or claim.

Covenants Not to Sue

- Case Law
  - *Medtronic AVE, Inc. v. Advanced Cardiovascular Sys., Inc.*, 247 F.3d 44, 55 n.4 (3d Cir. 2001) (release is a provision that intends a present abandonment of a known right or claim whereas a covenant not to sue constitutes an agreement to exercise forbearance from asserting any claim which either exists or which may accrue)
  - *Pacific StatesLumber Co. v. Bargar*, 10 F.2d 335, 337 (9th Cir. 1926) (releases of, and covenants not to sue, a wrongdoer, have from "early times" been considered distinct)
  - *Colton v. N.Y. Hosp.*, 414 N.Y.S.2d 866, 871-73 (1979) (canvassing the "generally abstrusely worded distinction" between releases and covenants not to sue).

Covenants Not to Sue

"No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission."

29 USC § 626(f)(4)

Covenants Not to Sue

"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."

29 CFR § 1625.23(b)

***See Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998).**

Covenants Not to Sue

"written in a manner calculated to be understood"

"Waiver agreements must be drafted in plain language . . . [which] usually will require the limitation or elimination of technical jargon and of long, complex sentences."

29 CFR § 1625.22(b)(3)

Covenants Not to Sue

"The waiver agreement must not have the effect of misleading, misinforming, or failing to inform participants and affected individuals. Any advantages or disadvantages described shall be presented without either exaggerating the benefits or minimizing the limitations."

29 CFR § 1625.22(b)(4)

Covenants Not to Sue

Thormforde v. IBM Corp., 406 F.3d 500 (8th Cir. 2005) ("manner calculated" case)

Syverson v. IBM Corp., 472 F.3d 1072 (9th Cir. 2006) (same)

Wastak v. Lehigh Valley Health Network, 342 F.3d 281 (3d Cir. 2003) (upholding covenant with legal fees to prevailing party)

Invalid OWBPA Waiver Actionable? (No)

Whitehead v. Oklahoma Gas,
187 F.3d 1184 (10th Cir. 1999) (OWBPA waiver provisions are shields, not swords)

EEOC v. Sears, Roebuck and Co.,
883 F.Supp. 211 (N.D. Ill. 1995) (violation of OWBPA may not alone serve as basis for ADEA claim)

EEOC v. Sara Lee Corp.,
923 F.Supp. 994 (W.D. Mich. 1995) and
Williams v. General Motors Corp.,
901 F.Supp. 252 (E.D. Mich. 1995) (same)

Invalid OWBPA Waiver Actionable? (Yes)

Commonwealth v. Bull HN Info. Sys.,
16 F.Supp.2d 90 (D. Mass. 1998) (analyzing earlier cases and determining that a violation of OWBPA conditions for an effective waiver of ADEA rights will support independent ADEA cause of action)

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4. Right to file charge / participate
- **cannot be waived**
- **purported waiver will trigger EEOC cause determination (Enforcement Guidance 04/10/97)**
- **does purported waiver constitute retaliation?**

Right to File Charge / Participate

"Agreements extracting such promises [not to file a charge or participate in an EEOC proceeding] may also amount to separate and discrete violations of the anti-retaliation provisions of the civil rights statutes."

EEOC Enforcement Guidance 04/10/97

Right to File Charge / Participate

Retaliation (generally):

Opposition – cannot discriminate because a person has opposed an unlawful practice.

Participation – cannot discriminate because a person has made a charge, testified, assisted, or participated in any manner in an agency investigation, proceeding, or hearing.

Retaliation? (No)

EEOC v. Sundance Rehab. Corp.,
466 F.3d 490, 502 (6th Cir. 2006) (rejecting EEOC's argument that the act of offering a release containing a promise not to file a charge is actionable as retaliation) (rehearing and rehearing en banc denied March 13, 2007)

Retaliation? (Yes)

***EEOC v. Lockheed Martin Corp.*, 444 F.Supp.2d 414 (D.C. Md. 2006) (agreeing with EEOC's argument that prohibiting filing of a charge is facially retaliatory)**

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5. WARN Act
   - *Joe v. First Bank System, Inc.*, 202 F.3d 1067, 1070 (8th Cir. 2000) (WARN Act claim released by general waiver)
   - *Williams v. Phillips Petroleum Co.*, 23 F.3d 930, 936-37 (5th Cir. 1994)
   - *Allen v. Sybase, Inc.*, 468 F.3d 642, 653-56 (10th Cir. 2006) (no release of Warn Act claim when claim arose after release was signed)

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