Avoiding Pitfalls of Severance Agreements

As a business owner, it is inevitable that there will come a time when, for some reason or another, you will need to terminate an employee. In many circumstances an employer will use a severance agreement to obtain a release for any potential liability under which a severance amount will be paid. As with many employee-employer issues, there are certain potential pitfalls that surround severance agreements that an employer needs to take into consideration when offering severance.

Potential Pitfalls in Offering Severance Agreements

**Put the Agreement in Writing:** This first issue seems like an obvious requirement, but in the event an employer is offering severance payment it is the best business practice to put it in writing that contains a release for the employer. Unless agreed to otherwise, an employer is under no obligation to offer severance pay. In the event the employer wants to pay such amounts, it needs to get the agreement memorialized in writing.

**Avoid Waiver of Future Claims:** An employee cannot effectively waive a future claim under a severance agreement. Therefore, if the agreement is provided when the employee is still employed, it is important the employee signs the agreement on the last day of the employment. Otherwise an employee could sign the agreement and release all claims and then a claim could arise following the release. The release is only effective for claims existing at the time the agreement is signed and will not prevent a lawsuit for a future act.

**Avoid Overly Broad Language:** While employers hope to obtain a broad release of any future legal action, there are certain rights an employee cannot waive, such as the right to file a charge of discrimination with the EEOC or to testify in any hearing conducted by the EEOC. Employers must be careful to not include overly broad releases in their severance agreements that may be construed as impairing an employee’s right to file an EEOC charge post-separation.

Recently, the EEOC has become more proactive and has initiated suits to combat what it believes are overly broad release and non-disparagement language that may lead the employee to think he or she could not file an administrative action. In *EEOC v. Baker & Taylor* the EEOC filed suit in the United States District Court of Illinois claiming that the release violated federal law by “conditioning the receipt of severance benefits on employees’ agreement to a severance agreement that deterred the filing of charges and interfered with their ability to communicate voluntarily with the EEOC…” The case was resolved by a consent decree entered on July 10, 2013, under which Baker and Taylor agreed to revise its agreements to remove language barring the initiation of a suit with an administrative agency of the United States and from discussing or commenting on the company in a manner that would “reflect negatively
on the company.” In addition, Baker & Taylor agreed to use the following language in all severance agreements that sought a release:

Nothing in this Agreement is intended to limit in any way an Employee’s right or ability to file a charge or claim of discrimination with the U.S. Equal Employment Opportunity Commission (“EEOC”) or comparable state or local agencies. These agencies have the authority to carry out their statutory duties by investigating the charge, issuing a determination, filing a lawsuit in Federal or state court in their own name, or taking any other action authorized under these statutes. Employees retain the right to participate in such any action and to recover any appropriate relief. Employees retain the right to communicate with the EEOC and comparable state or local agencies and such communication can be initiated by the employee or in response to the government and is not limited by any non-disparagement obligation under this agreement.

For more information, the consent decree is available here.

Employees Over 40

Comply with the Older Workers Benefit Protection Act (OWBA): Employers with 20 or more employees need to be aware of the OWBA when terminating an employee who is 40 years and older. The OWBA is a section within the Age Discrimination in Employment Act (ADEA) that establishes strict requirements for an employer to “knowingly and voluntarily” release ADEA claims. Among other requirements, to be considered a valid ADEA waiver, a severance agreement must at a minimum include the following:

- be in writing and be understandable;
- specifically refer to ADEA rights or claims;
- not waive rights or claims that may arise in the future;
- be in exchange for valuable consideration in addition to that which the employee is already entitled; and
- advise the individual in writing to consult an attorney before signing the waiver.

Additionally, it is imperative that an employer provide the employee at least 21 days to review the agreement and an additional 7 days to revoke the agreement after signing it.

Termination of Multiple Employees: There are additional requirements when an employer is terminating the employee as part of a group. This applies in both voluntary situations, such as an exit incentive program where an employee is provided additional consideration to voluntary resign and sign a waiver, and in an involuntary termination. Specifically an employer must provide at least 45 days for an employee to consider the waiver and give written notice of information on the “decisional unit” – the group under which the employer selected the layoffs – that identifies the employees to be terminated and those who were not, along with job titles and ages. This requirement is directed at illustrating any potential disparate effect a layoff may have on an older employee in order for the employee to “knowingly” release a potential claim.

Conclusion

This article does not cover all issues that can occur in severance agreement and is only meant to highlight certain pitfalls. We encourage all business owners to utilize legal counsel when negotiating severance agreements. At a minimum, a company should have its standard severance agreement form reviewed to ensure there are no major issues with the boilerplate language and its own customary policy for offering and negotiating severance amounts. Employers are under no obligation to provide severance pay; therefore, it is important to ensure that in reality the agreement does what the employer believes it does instead of paying significant sums to find the agreement is unenforceable.