



Don't Get Caught by Your Release

By Jeffery A. James

Business owners, managers, human resource professionals, and in-house counsel know that one way to sleep easy at night is to get a release of claims and covenant not to sue from a departing employee. In all cases, the employee must be given something in exchange for signing the Agreement, such as severance pay, but the resulting peace of mind from knowing the employee can't come back and sue is considered worth the price. What if you awoke one day to learn that your release of claims was not valid because it didn't comply with the Older Worker Benefit Protection Act (OWBPA)? That nightmare was recently visited upon IBM by the Ninth Circuit in *Syverson v. International Business Machines Corp.*

What's the OWBPA? The OWBPA is a federal law intended to protect older workers from age discrimination under the federal Age Discrimination in Employment Act (ADEA). It applies only in cases where the departing employee is at least 40 years of age and the employer seeks a complete release of all claims.

To be valid under the OWBPA, a release of claims must be "knowing and voluntary." There are a number of requirements that must be met before a release will be considered knowing and voluntary, including:

- The agreement must specifically reference the ADEA;
- The employee must be advised to consult with an attorney before signing;
- The employee must be given seven days to revoke the agreement after signing;
- The employee must be given 21 or 45 days to review the agreement before signing (the longer period applies in the case of an exit incentive plan or group layoff, and includes the requirement that information about the selection process be provided; either notice period may be waived by the employee); and,
- The release must "be written in a manner calculated to be understood" by the average employee eligible to participate in the agreement.

This last requirement was central to the dispute in *Syverson*.

What Happened in *Syverson*. In 2001, IBM went through a reduction in force (RIF). It offered all affected employees a severance package that included a "General Release and Covenant Not to Sue" (the "Agreement"). The Agreement contained the following language:

[You agree] that this release covers, but is not limited to, claims arising from the [ADEA]. . . You agree that you will never institute a claim of any kind against IBM. . . If you violate this covenant not to sue IBM. . ., you agree that you will pay all costs and expenses of defending against the suit incurred by IBM. . . . *This covenant not to sue does not apply to actions based solely under the [ADEA], as amended. That means 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 attorneys' fees and other costs and expenses of defending against the suit.*

This Release does not preclude filing a charge with the U.S. Equal Employment Opportunity Commission. (*italics added*)

The plaintiffs were a group of terminated employees who were presented with, and ultimately signed, the Agreement. After taking the severance payment, they went first to the Equal Employment Opportunity Commission (EEOC), and later to court, alleging that they had been discriminated against under the ADEA. They argued that the Agreement (specifically, the italicized language) did not preclude them from suing under the ADEA. The employer counterclaimed for breach of the Agreement and sought attorney fees and costs. The district court agreed with the employer, dismissed the claims, and entered judgment for the employer in the amount of \$27,500.

In a Manner Calculated to Be Understood. The Ninth Circuit reversed. The Court rejected the legal arguments raised by IBM by falling back on the requirement that the release language “be written in a manner calculated to be understood.” The Court found that the Agreement could be read by the plaintiffs as carving out a right to sue under the ADEA, despite the release of claims. It noted that the distinction between a release of claims and covenant not to sue might be meaningful to a lawyer or judge, but even then, had no practical effect. By combining the two in the same section of the Agreement, the covenant not to sue swallowed the release – and “negation of the covenant not to sue can therefore be read as negating the release as well.” In other words, the distinction was lost on the average layperson and hence the OWBPA had not been complied with.

IBM’s counsel argued that the italicized language was included to comply with another technical requirement of the ADEA dealing with recovery of attorney fees. It wanted to ensure it could recover attorney fees if sued for a claim that was released under the Agreement, but it was required to carve out the attorney fee exception if the plaintiffs challenged the agreement under the ADEA to comply with EEOC regulations. The Court was unmoved, stating that IBM could have and should have drafted clearer language to accomplish its objective.

What’s An Employer To Do? While the language of the OWBPA has not changed since it was enacted in 1990, courts and the EEOC continue to interpret its requirements. Consequently, standard release agreements in an employer’s file may no longer comply with the OWBPA. Legal counsel should always be consulted before presenting an employee with a release agreement, but especially when seeking a release of possible ADEA claims.

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