

Employment Law Digest

An Update from Thornton, Biechlin, Segrato, Reynolds & Guerra, L.C. Employment Law Department

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Severance Agreements and Waivers - Lots of Potholes for the Unwary

There is no law in Texas requiring employers to offer severance packages to terminated employees, yet many companies still chose to do so for various reasons. Some employers make these offers in an effort to protect their reputation with the community, while others simply want to make life a little easier for their former employees while they look for a new job or transition into a new phase of life. A far more common motive for offering such packages, is as an incentive to get the former employee to sign a waiver of all legal claims he or she may have against the employer.

When an employer offers a former employee a severance package in return for a waiver of any legal claims, the most important concern is that the agreement actually be enforceable. This newsletter cannot cover every aspect of a release but severance agreements should contain several specific sections to guarantee that they will be enforced as intended if it ever brought before a court. First, the agreement should state the date on which the employee was terminated. The agreement should also specifically lay out the amount and type of all benefits being granted by the employer, and the length of time the former employee will continue to receive each benefit. Next, if an employer wants to be sure that the former employee will be available to assist in training his or her replacement, then this should be stated in the severance agreement, along with any specific severance benefit that is being given in return for this service. If the former employee handled any sensitive or confidential information or trade secrets, the severance agreement should also state that such information must remain confidential.

The next section of the agreement should contain the employee's waiver and release of any claims against the employer. Employers who offer severance packages in return for the employee's waiver of claims need to be very specific and careful in drafting and executing the waiver portion of the severance agreement, because even the smallest mistake may make the whole agreement unenforceable. For any and all claims the former employee is waiving, the agreement should state, by name, the act or law that would create the employee's potential claim. For example, in order to waive any claims that the former employee might have under the Family and Medical Leave Act (FMLA), the agreement would have to specifically state that the employee is waiving any and all FMLA claims.

If the terminated employee is 40 years old or over, and the severance agreement waives claims arising under the Age Discrimination in Employment Act (ADEA), there are additional and very specific waiver requirements governed by the Older Workers Benefit Protection Act (OWBPA). The main focus of these extra requirements is ensuring that an employee's waiver of rights under the ADEA is "knowing and voluntary" and give the employee specific amounts of time to consider and revoke the agreement.




To be “knowing and voluntary,” the waiver must be a part of an agreement between the employer and employee that is written in plain English and is calculated to be understood by the employee. In determining whether a certain agreement is “calculated to be understood,” courts look at the education and comprehension level of the employee signing the waiver. Additionally, the agreement containing the waiver should not mislead, misinform, or fail to inform the employee of the rights he or she is giving up. The agreement may not present the advantages or disadvantages of the agreement in a way that exaggerates the benefits or minimizes the disadvantages of the agreement as a whole. Of course, the waiver must also specifically name the ADEA in order to waive any ADEA claims.

In addition to being a “knowing and voluntary” waiver of claims, waivers or releases of ADEA claims are subject to a number of other requirements. First, before an employee can sign such a waiver, the employer must advise him, in writing, to seek legal advice. Second, the employee must also be given at least 21 days to look over and consider the waiver before signing it. The waiver must also state that it is revocable for 7 days after it is signed. The employer must also give the employee something of additional value in return for the employee signing the waiver; the waiver of ADEA claims will be invalid if it is signed in exchange for benefits to which the employee was already entitled. Finally, if the employee’s waiver is part of a group termination program or an Early Retirement Incentive Program, before any employee may validly waive his rights under the ADEA, the employer must give all members of the terminated or eligible group certain information including the job titles and ages of all terminated or early retirement eligible employees and the ages of all employees in the same job classification who are not being terminated or considered eligible for the early retirement program.

Severance agreements, whether or not they include a waiver of ADEA claims, should also include two additional sections. First, the agreement should make it clear that the agreement is voluntary on the part of the terminated employee and that the employee was placed under no duress or pressure to accept the agreement. The agreement should also include a “No Admission” section. This part of the agreement states that even though the employer offered a severance agreement and requested a waiver by the employee of all claims, this does not mean that the employer admits that it engaged in any illegal employment activity.

Employers who do decide to offer severance packages to terminated employees also need to be aware of two important provisions of the Texas Payday Act. First, if an employer has

a written policy which provides for severance packages, this Act allows the Texas Workforce Commission to enforce the agreement. Second, the Act says that if the employer’s written policy providing for severance packages does not specifically require employees to release or waive all claims against the employer as a condition of receiving the severance package, then the employer cannot require the former employee to sign such a release.

Although severance packages aren’t required in Texas, there are many good reasons to offer them to at least some former employees. Even if you don’t believe an employee has any potential claims against you, it’s always a good idea to add a waiver section to a severance agreement if you are planning on offering a severance package anyway. And if you weren’t planning on offering a particular employee a severance package, you might consider the fact that it could cost you much less in the long run to go ahead and do so, in exchange for a waiver, than it would if that employee decides to sue you in the future. 

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Trends In The Law

English Only in the Workplace? Maybe if You’re Careful

In many recent cases, the EEOC has stated that rules requiring employees to speak only English in the workplace qualify as national origin discrimination in many circumstances. When employers require their employees to speak in English at all times, the EEOC says, this creates an atmosphere of inferiority, isolation and intimidation for employees whose native language is something other than English. English only rules in the workplace are usually found to be disparate treatment discrimination of individuals, and are therefore outlawed by Title VII of the Civil Rights Act of 1964. In a recent New York case, however, a federal district court found that an English only rule made by a national cosmetics retailer was backed by a valid business necessity and did not discriminate against Hispanic employees.


Sephora is a retail chain that sells cosmetics and other beauty care products. Their policy requires salespeople to speak only English when customers are present, in order to promote politeness, helpfulness and approachability. Although English is required when speaking to customers or in the presence of customers, employees may speak any



language when no customers are in the store or when the employee is not on the sales floor.

The EEOC sued Sephora on behalf of five Hispanic former employees, claiming disparate impact under Title VII. Under a disparate impact theory, an employer can be found liable for discrimination for a policy that is neutral on its face but acts to discriminate against a protected class of people when applied to a particular workforce. A plaintiff doesn't even have to prove that the employer had the intent to discriminate under a disparate impact theory which can make such claims difficult to defend.

Under the EEOC's own guidelines an employer may require employees to speak only in English at certain times for which the employer can show a business necessity. Although the EEOC doesn't believe that customer preference is a valid defense to discrimination against employees, the court found that politeness and approachability are central to the job of sales employees at a retail store, and have nothing to do with customer prejudices. Since Sephora's policy is job-related and qualifies as a business necessity, it complies with EEOC guidelines and does not violate the 1964 Civil Rights Act.

To summarize, it is very difficult and dangerous to require employees to speak only English in the workplace at all times. However, employees may lawfully be required to speak English around customers or in situations where safety could be an issue if a language other than English is spoken. Employees should always be allowed to speak their native tongue while on break or when they are away from customers and safety sensitive positions. 


Trouble Pronouncing an Employee or Co-Worker's Name? Try Harder

The scary thing is, we've probably all done it. You have a co-worker or an employee with a name that is especially hard to pronounce, so you shorten it to something that is much easier to say. No problem, right? Probably not if the person who bears the name doesn't mind or even suggests the nickname himself. But what happens when the person with the difficult name really wants to be called by his given name, and you just can't seem to manage it? Could be a \$30,000 court judgment against you.

In a 2005 case out of the 9th Circuit, a man named Mamdouh El-Hakem, who is of Arabic heritage, worked for BJY, Inc. The company's CEO had trouble pronouncing Mamdouh's name, so he called him "Manny" instead. Mamdouh told the CEO that he didn't want to be called Manny, and that he would prefer to be called by his real

name, but the CEO persisted in calling him Manny for almost a year, until Mamdouh El-Hakem sued, and was awarded a \$30,000 verdict.

Mr. El-Hakem's nickname claim was filed under Section 1981 of the Civil Rights Act of 1866, which forbids discrimination against someone because of his ethnic characteristics which, the court said, can include a person's name. Although the use of this nickname doesn't seem harsh enough to warrant a \$30,000 verdict, the reality is that a hostile work environment that violates the civil rights law can be created through the pervasiveness and frequency of an action, even if that action isn't very severe. Discrimination cases are usually made worse whenever the alleged discriminator is in upper management - in this case the CEO. In addition to being relatively easy to violate, Section 1981 is also quite formidable because it has no damage caps, and because individuals who violate it, such as executives and managers, can be held personally liable - meaning that the CEO in this case will be writing Mr. El-Hakem a very large check possibly out of his own check book.

Although not often pled, discrimination claims under the Civil Rights Act of 1866 (codified in 42 U.S.C. §1981) are very dangerous claims that do not have a cap on damages. Although technically these claims are supposed to involve only race discrimination, but as you can see the statute allows a variety of claims to be brought against employers. If an employee does not like something that is going on around him in the workplace whether it be the way his name is being pronounced or the way people are looking at him, it is no longer acceptable to just ignore his complaints and go on about your business. More and more statutes and courts are placing an affirmative obligation on employers to take action to remedy the problem or at least attempt to eliminate the issue. 

Consider Accommodating Disabled Workers

Barbara Cutrera suffers from Stargardt's disease, which causes her vision to steadily deteriorate. She has virtually no central vision in her left eye and only a little in her right. There is no known cure for the disease, and her vision cannot be corrected with eyeglasses, contact lenses or surgery.

Ms. Cutrera applied for a job as a research assistant at the Louisiana State University (LSU) Foundation, which raises money for LSU. Ms. Cutrera was hired on July 28, 1998, even after describing her visual impairment during her



interview. Ms. Cutrera, however, had trouble reading many of the materials that she had to review for her job, and quickly realized that she would need some type of accommodation in order to do her work. On July 31, she met with a rehabilitation counselor to discuss potential accommodations, and on August 3, she met with LSU's Americans with Disabilities Act (ADA) coordinator, Marian Callier.

According to Ms. Cutrera, she told the ADA coordinator that she had met with a rehabilitation counselor and that the counselor could meet with Ms. Callier and the LSU Foundation to discuss some potential accommodations. Ms. Callier, on the other hand, claimed that Ms. Cutrera informed her that she was unable to perform her job duties and couldn't immediately identify an appropriate accommodation. However the meeting went, Ms. Cutrera was fired before it was over, only 6 days after she was hired.


Ms. Cutrera quickly sued, claiming that her firing violated the Americans with Disabilities Act. The trial court threw out her claim, reasoning that Ms. Cutrera was not "disabled," so as to be protected by the ADA, and that she never requested an accommodation from her employer.

The Fifth Circuit Court of Appeals disagreed with the trial court and ruled that Ms. Cutrera gets to have her claim heard by a jury. In making this decision, the appellate court determined that Ms. Cutrera's condition does in fact qualify as a disability.

Because of the deterioration in Ms. Cutrera's vision, she doesn't feel safe driving and she has difficulty reading small type, handwriting, or any writing with poor contrast. Basically, she has trouble doing what most people take for granted. Although courts must consider any mitigating measures that could keep a certain condition from being substantially limiting when the court determines whether a disability exists, there was no possible corrective measure here - glasses, contacts and surgery would be of no help. Therefore, Ms. Cutrera is disabled and is entitled to protection under the ADA.

The appellate court also disagreed with the trial court's finding that Ms. Cutrera had not requested an accommodation from LSU. Although the two women have differing accounts as to exactly what was said in their meeting - the end result was that Ms. Cutrera was fired immediately, without a discussion of possible accommodations.

This case is important because it tells us that hiring someone with a disability does not keep you from violating the Americans with Disabilities Act. Hiring a disabled person is only the first step in complying with the ADA. You still have to provide reasonable accommodations (if they do not cause an undue hardship) and you still have to discuss reasonable


accommodations with the employee. You aren't immune to the ADA once you hire a disabled person. If the LSU Foundation had simply taken an interactive approach to consider possible accommodation, and fired Ms. Cutrera only after determining that there was no reasonable accommodation, the Foundation could now be spending less time inside a courtroom spending money, and more time in their offices raising it. 

Non-Testifying Employee Still Protected from Retaliation

The United States Court of Appeals for the 2nd Circuit recently decided that an employee who claims she was fired for supporting a co-worker's sexual harassment claim is entitled to bring her retaliation claim before a court.

The employee, Donna Jute, was identified by a co-worker as the sole witness supporting that co-worker's sexual harassment allegations against their employer, Hamilton Sundstrand. Although Ms. Jute never testified in that co-worker's case against their employer, she claims that her layoff after 14 years was not part of a corporate reorganization, as the company claimed, but that she was fired in retaliation for being listed as a possible witness in the other woman's case. Ms. Jute also alleged that Hamilton Sundstrand refused to give her a reference for a prospective employer because they had a lawsuit pending - the one in which she was listed as a witness.

Title VII of the 1964 Civil Rights Act protects employees who participate in almost any manner in a Title VII proceeding, and Ms. Jute's co-worker's sexual harassment claims falls under Title VII. A district court, however, originally dismissed Ms. Jute's claim against Hamilton Sundstrand, finding that there was no connection between Ms. Jute's protected activity (supporting her co-worker's claim) and her own layoff. The appellate court for the 2nd Circuit disagreed.

Although Ms. Jute never actually testified on behalf of her colleague, the appellate court said that it would go against the entire purpose of Title VII to leave an employee who sits ready to support a co-worker's discrimination claim completely unprotected under the law. Further, the court concluded by not allowing retaliation claims like Ms. Jute's, courts would open the door for employers to retaliate against Title VII reporting, so long as the employer retaliates before the employee actually testifies. 



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The contents of this newsletter are presented as general information only and are not intended as legal advice. The reader is invited and advised to consult with an attorney for more specific information regarding the matters and materials addressed herein, or for advice based on the individual circumstances of his or her specific situation.

The employment law section of the Thornton law firm represents management in a wide variety of employment law matters. Because we have offices located in San Antonio, Austin and McAllen, Texas, we can offer exclusive and timely insight into handling particular employment matters in diversified areas of the state. Of course, our focus is still on claim avoidance through timely advice and counsel before events occur which can lead to lawsuits; however, our firm has extensive jury trial experience in a wide variety of employment law matters. Our expertise includes the following areas:

- management counseling;
- review and preparation of personnel policy and procedures including employee handbooks;
- representation in administrative matters before the Equal Employment Opportunity Commission and the Texas Workforce Commission;
- representation of management in state and federal court for employment related claims involving Title VII of the Civil Rights Act of 1964, Americans with Disabilities Act, Age Discrimination in Employment Act, Polygraph Protection Act, Consolidated Omnibus Budget Reconciliation Act, Worker's Compensation Retaliation, Family Medical Leave Act, Fair Labor Standards Act, Texas Commission on Human Rights Act and a variety of state court claims such as intentional infliction of emotional distress, invasion of privacy, defamation and negligence;
- preparation of arbitration agreements and non-subscriber programs;
- Training and preventative seminars to comply with recent U.S. Supreme Court decisions; and
- Wage/hour audits; FLSA claims.

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