Louisiana Employment Law Letter

H. Mark Adams, Editor; Alan F. Kansas and Jennifer L. Anderson, Associate Editors

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Highlights

TERMINATION

Separating winners from losers when drafting separation agreements

Separation agreements can be a useful tool in eliminating litigation and liability risks, whether you're terminating just one employee or a group. Generally, a separation agreement is one in which the employee promises not to sue you in exchange for money to which she wouldn't otherwise be entitled or for other nonmonetary promises. Because an employer pays or promises something over and above what the employee should ordinarily receive in exchange for the waiver, it's important that the agreement be worded properly and be reviewed by legal counsel to ensure it will be enforceable.

You've heard us say before that anyone can sue for any reason — the question is whether you've done your best to minimize the legal exposure and put yourself in a good defensive position. Even the most carefully worded separation agreement can be challenged in court by an employee, whether she claims that she didn't understand what she signed or that the agreement didn't waive certain claims. That's what happened in a recent case when an employee tried to get around the terms of her separation agreement by going to court anyway. Read on to find out how the court resolved the dispute, when separation agreements might be appropriate, and how to make them airtight.

Too close for comfort?

A female executive employed by a home health care company claimed she was sexually harassed by the chief operations officer (COO), who was her immediate supervisor; the chief financial officer (CFO); and the chief executive officer (CEO) during her rather short career with the company. There's no need to go into the details because that's not what this article is about. But suffice it to say, the employee would have had a dangerous sexual harassment claim if what she alleged was shown to be true.

Employee and company sign agreement and part ways

Not surprisingly, the company heard that the employee had made derogatory comments about it and the CFO. At that point, the CEO and human resources director met with the employee and

gave her the opportunity to resign in lieu of termination. The company offered her two months of pay in exchange for her signing a separation agreement that contained a release of "any and all employment related claims." She signed on the dotted line and took the money.

Undeterred by the agreement, however, the employee sued the company and the COO, CFO, and CEO individually, alleging sexual harassment, discrimination, retaliation, and intentional infliction of emotional distress. The company and its officers requested that the court dismiss the employee's claims, and the court did so. The employee appealed that decision to the U.S. Fifth Circuit Court of Appeals in New Orleans, which then examined whether the lower court properly dismissed the case.

Court scrutinizes separation agreement

The court first explained that an employee's agreement to waive her potential claims under federal employment discrimination laws, such as Title VII of the Civil Rights Act of 1964, is valid if it's "knowing and voluntary." In answering that question, courts have traditionally evaluated the following factors:

1. the employee's education and business experience;
2. the amount of time the employee had possession of or access to the agreement before signing it;
3. the employee's role in deciding the terms of the agreement;
4. the clarity of the agreement;
5. whether the employee was represented by or consulted with an attorney; and
6. whether the employee received anything in exchange for her release that exceeds what she already would have been entitled to either by contract or by law (commonly referred to as the necessary "consideration" for the agreement).

After considering those factors, the court concluded that the separation agreement was binding and that the employee had released her federal and state employment law claims against the company. The court explained that the money paid to the employee was sufficient "consideration" in exchange for her waiver — that is, it was over and above any money the company already owed her.

The court further observed that the employee was a high school graduate who completed a business administration course at a business college as well as two semesters of accounting classes at Louisiana State University. Additionally, she was given no deadline for signing the separation agreement, so she had plenty of time to seek legal advice, review it, and consider the decision to sign. The court also noted that it was part of the employee's job at the company to negotiate contracts with physicians and that she actually struck portions of the separation agreement before she agreed to sign it, which indicated that she could have negotiated or made further revisions if desired. The separation agreement itself was only a one-page document that stated in plain and simple language that the employee "released [the company] of any and all employment related claims."

Finally, the court observed that the employee submitted no evidence to show that she either was mistaken about what she was signing, didn't understand the rights being released, or didn't intend to release her claims.

For different reasons, the court also upheld the dismissal of the employee's intentional infliction of emotional distress claims and her claims against the individual executives. The court observed that individuals can't be sued under Title VII and Louisiana's discrimination law and that the conduct alleged (however serious) wasn't extreme and outrageous enough to meet the high standard for maintaining an intentional infliction of emotional distress claim. Thus, the employee was bound by the agreement and these other legal constraints and couldn't proceed with her lawsuit. *Smith v. Amedisys, Inc., et al.,* 2002 U.S. App. LEXIS 15013 (5th Cir. 7/26/02).

Whether and when to use separation agreements

Separation agreements can come in handy when you find yourself in a dispute with a soon-to-be-former employee and want to settle the matter once and for all, when you think you may have some legal exposure (*i.e.,* potential liability) in making a particular employment decision, or when you're dealing with an employee who has demonstrated a proclivity to complain or who you otherwise suspect is litigious. This case is a good example of when a separation agreement can be used effectively to avoid costly litigation.

According to the employee's account of her experience while working with the other executives, she certainly had a motivation and reason to sue, and it would have been expensive for the company and executives just to defend against all her claims on the merits, much less pay any judgment that might have been rendered after trial. Although this employer had to go through the legal motions to have its separation agreement declared valid and binding, the cost of enforcing the agreement is minimal when compared to the expense of litigation on the merits and potential liability. Additionally, the fact is that most employees who accept separation agreements don't sue.

You may have to pay a little more than the employee's final wages or other ordinary benefits on the front end, but a written separation agreement with the appropriate release language will buy you peace of mind and keep you out of expensive employment litigation. In fact, it's often the nonmonetary promises that enable you to seal the deal with your soon-to-be-former employee. A neutral letter of reference (unless you provide one as a matter of policy or standard practice) may be extremely important to an employee who's concerned about being able to find another job. To others, your agreement to pay COBRA premiums, or some portion thereof, for a period of time may also go far in securing a release.

The finer points of waiving federal age claims

Although it may be tempting to recycle separation agreements for different employees, that's a dangerous practice. You should always consult your legal counsel to review or prepare any such proposed agreement, particularly if it's one you've recycled and want to use again. This point is particularly important because there are certain provisions that must be included in a release if the employee is 40 or more years of age or you're terminating a group of employees under certain circumstances and a protected individual is affected.

The Older Workers Benefit Protection Act, which amended the Age Discrimination in Employment Act (ADEA), requires that employees 40 years of age or older who are being asked to waive federal age claims be given a period of at least 21 days to consider the terms of the release before signing. Additionally, the release must advise the employee of her right to seek an attorney's advice before signing. Finally, even after the employee signs the waiver, the ADEA requires that she be given an additional seven days to revoke the agreement. She can waive the

21-day requirement by signing and returning the agreement before the period has expired, but the seven-day revocation period may not be shortened.

Separation agreements are also helpful when you have a reduction in force. Additional notice and disclosure requirements apply, however, so you should consult with your legal counsel when considering offering waivers to a group of employees to determine whether the requirements apply and how to satisfy them.

Don't forget the 'consideration'

Another common pitfall for employers that draft their own separation agreements is failing to provide "consideration," or something extra, in exchange for the waiver. Such agreements require that the employee receive something, monetary or nonmonetary, *over and above* what she's entitled to receive. For example, if the employee has unused accrued vacation pay, reimbursements, final wages, COBRA benefits, or any other money or items required to be given to her under the terms of her employment or by law, such money or items must be provided regardless of whether she agrees to sign a release.

To avoid any confusion between what sums are owed to the employee and what sums are being promised in exchange for a signed release, it may be helpful to present the employee with a separate memo or letter detailing the compensation and benefits she will receive on termination regardless of whether she signs a waiver. Remember that if you already have a policy or practice of paying severance under certain circumstances and the employee is eligible or entitled to severance, you must include an additional sum of money or other nonmonetary promise to have sufficient consideration for the agreement. Again, legal counsel can help you sort out any questions you have about whether the proposed consideration is sufficient.

Don't go it alone

Deciding whether and how to offer a separation agreement can be difficult. On one hand, a separation agreement can help avoid costly litigation and liability. On the other hand, offering a separation agreement can sometimes stir up litigation that otherwise wouldn't have occurred.

The other factor is how frequently you use such agreements and whether you're paying out more in consideration than you would in defending a lawsuit or paying a judgment. Although some companies that use such agreements regularly prefer the certainty that litigation has been avoided to the prospect that it might arise, others prefer to use such agreements more selectively based on some of the factors we previously mentioned.

As this recent case shows, the language of the agreement and the details of how the agreement is offered are often tough issues that professional legal advice can help you sort out. For instance, this case may have been simpler if the agreement had included a specific release of claims against the company's executives and employees.

Also, if the release had been worded to include all claims "arising from her employment" rather than just "employment related claims," the employee may have been found to have waived her intentional infliction of emotional distress claim. Instead, the employer and the executives had to defend that claim on the merits because the court construed the "employment related claims" language to apply only to federal and state statutory employment claims. To help you with all of these considerations and make sure you get what you pay for in a separation agreement, seek advice from employment counsel in advance.

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