



EEOC ISSUES MEMORANDUM ON WAIVERS OF DISCRIMINATION IN EMPLOYEE SEVERANCE AGREEMENTS



Howard Jackson

"All age discrimination waivers, unlike other discrimination claim waivers, require a special set of provisions to be written into the waiver agreements, and group waivers require even more provisions."

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The EEOC has issued a memorandum answering questions that employees may have if they are offered a Severance Agreement in exchange for a waiver of actual or potential discrimination claims. The memorandum includes a checklist with tips on what employees should do before signing a waiver in a Severance Agreement and a sample of an agreement offered to a group of employees giving them the opportunity to resign in exchange for severance benefits. Of particular interest to employers is the sample group waiver agreement, that complies with the difficult provisions of the Older Worker Benefit Protection Act (OWBPA). The discussion concerning such group waivers under the age discrimination laws is also of interest to employers. All age discrimination waivers, unlike other discrimination claim waivers, require a special set of provisions to be written into the waiver agreements, and group waivers require even more provisions.

When an employee age 40 and over is separated as part of an "Exit Incentive Program" or "Other Employment Termination Program," a waiver must include special terms. In these two cases an employer must provide enough information about the factors it used in making selections to allow employees who are laid off to determine whether older employees were terminated while younger ones were retained.

Typically, an "Exit Incentive Program" is a voluntary program where an employer offers two or more employees, such as those in specific organizational units or job functions, additional consideration as part of an offer to voluntarily resign and sign a waiver. An "Other Employment Termination Program" generally refers to a program where two or more employees are involuntarily terminated and are offered additional consideration in return for their decision to sign a waiver.

Whether a "program" exists depends on the facts and circumstances of each case; however, the general rule is that a "program" exists if an employer offers additional consideration – or, an incentive to leave – in exchange for signing a waiver to more than one employee. In contrast, if a large employer terminated five employees in different units for cause (e.g., poor performance) over the course of several days or months, it is unlikely that a "program" exists.

Where a group of employees is being laid off and asked to sign a waiver, in addition to meeting the minimum OWBPA "knowing and voluntary" requirements, the employer must provide written notice of the layoff and at least 45 days to consider the waiver before signing it. (The employee need not wait that long to sign, but must be given that length of time to consider the agreement.) The employer must also inform the employees in writing of the "decisional unit" – the class, unit, or group of employees from which the employer chose the employees who were and who were not selected for the program. The particular circumstances of each termination program determine whether the decisional unit is the entire company, a division, a department, employees reporting to a particular manager, or workers in a specific job classification.

In addition, the employer must inform the employees in writing of eligibility factors for the program, the time limits applicable to the program, the job titles and ages of all individuals who are eligible or who were selected for the program (the use of age bands broader than one year, such as "age 40-50" does not satisfy this requirement), and the ages of all individuals in the same job classifications or organizational unit who were not eligible or who were not selected.

Continued on page 4 ►►

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ICE SENDS OUT 1000 NEW WORKPLACE AUDIT NOTICES AND EXPLAINS ITS AUDIT PROCESS



Anita Patel

"The notices alert businesses that ICE wants to inspect their employment records to determine whether or not they are complying with employment eligibility verification laws and regulations."

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U.S. Immigration and Customs Enforcement (ICE) on November 19 announced the issuance of Notices of Inspection (NOIs) to 1000 employers across the country, who were selected for inspection as a result of investigative leads and intelligence and because of the businesses' connection to public safety and national security. On July 1, 2009, ICE issued 652 similar letters to companies nationwide, which was more than ICE issued throughout all of last fiscal year when it only sent out 503 similar notices. The notices alert businesses that ICE wants to inspect their employment records to determine whether or not they are complying with employment eligibility verification laws and regulations. The notices provide the employer three business days to produce the requested documents, which generally include requests for I-9 forms for current and former employees, payroll lists, Social Security letters and responses, and related items. Usually within a month or two after receiving the requested documents, ICE sends out a response to the employer.

In its November 19 news release, ICE released the results from the 652 audits announced in July.

- ICE agents reviewed more than 85,000 Form I-9s and identified more than 14,000 suspect documents—approximately 16 percent of the total number reviewed.
- To date, 61 Notices of Intent to Fine (NIFs) have been issued, resulting in \$2,310,255 in fines. In addition, 267 cases are currently being considered for NIFs.
- ICE closed 326 cases after businesses were found to be in compliance with employment laws or after businesses were served with a Warning Notice in expectation of future compliance.

In addition, in the same news release, ICE announced the statistics since the implementation of its new workforce enforcement strategy on April 30, 2009. It states that it has conducted 1,069 Form I-9 inspections, and issued 142 NIFs totaling \$15,865,181. It also stated that 45 businesses and 47 individuals were debarred.

In the news release, ICE explained its auditing process. When technical or procedural violations are found, an employer is given 10 business days to make corrections. An employer may receive a monetary fine for all substantive and uncorrected technical violations. Employers determined to have knowingly hired or continued to employ unauthorized workers, will be required to cease the unlawful activity, may be fined, and in certain situations may be prosecuted criminally.

Monetary penalties for knowingly hiring and continuing to employ violations range from \$375 to \$16,000 per violation, with repeat offenders receiving penalties at the higher end. Penalties for substantive violations, which include failing to produce a Form I-9, can range from \$110 to \$1,100 per violation. In determining penalty amounts, ICE considers five factors: the size of the business, good faith effort to comply, seriousness of violation, whether the violation involved unauthorized workers, and history of previous violations.

Where a Notice of Intent to Fine is issued, charging documents will be provided the employer specifying the violations committed. The employer then has the opportunity to either negotiate a settlement with ICE or request a hearing before an Administrative Law Judge within 30 days of receipt of the NIF.

Editor's Note: The November 19 news release by ICE is part of its strategy of shifting from workplace raids to I-9 Audits with the potential for civil and criminal fines and enforcement actions. The message to employers is that focusing on I-9 compliance is more important than ever. Internal and external audits are highly desirable if not necessary, and one of the easiest remedies is to identify I-9 forms that have not been completely filled out so that the employer can get the missing information from current employees. Of course, it is critical when correcting an I-9 that the employer clearly notes when the correction is made so that ICE does not think the employer is trying to cover up.

It would also be wise for employers to examine some of the ICE notices that have been issued, and determine how it would respond, since the time frame for response is only three business days. For example, employers should make sure they don't have any old Social Security mismatch letters lurking around that have not been addressed, because completely ignoring mismatch letters could lead to greater fines and penalties.

Audits conducted by Wimberly Lawson reveal error rates in excess of 50%, and some have been in excess of 90%.

Another issue that should be considered by employers is developing protocols for responding to ICE audits, including whether or how last-minute corrections or actions are to be taken.

GENETIC LAW BAN WENT INTO EFFECT IN NOVEMBER



The Genetic Information Non-Discrimination Act (“GINA”) went into effect on November 21, 2009, for all employers with fifteen or more employees, prohibiting employers from requesting genetic testing or information or considering someone’s genetic background in making employment decisions. Genetic tests determine whether someone is at risk of developing an inherited disease or medical condition, like having a predisposition for certain maladies.

Margaret Noland

“The biggest change in the law is that it will in most cases prohibit employers and health insurers from asking employees to give their family medical histories.”

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voluntarily fill out their history, although it must be made clear that they will receive no financial reward for doing so.

If an employer obtains genetic information, GINA requires the employer to keep such information separate from personnel files, but allows employers to keep the data in the same file as medical information that is subject to the ADA. GINA provides six exceptions, allowing disclosure of genetic information to: the individual to whom the genetic information relates; an occupational health researcher; to comply with a court order; to government officials investigating GINA compliance; to comply with the requirements of the Family and Medical Leave Act or similar state or local laws; and to federal, state, or local health officials in connection with a family member’s contagious disease.

Employers may need to look at the forms they currently use for employee leaves of absence and even accommodation requests under the ADA, to make sure they are not requesting data that could be deemed genetic information. In many cases workplace posters, employee manuals, and other internal documents may need to be revised to reflect that genetic discrimination has been added to the other prohibitions. Employers must display the revised version of the poster issued by the EEOC that now includes genetic bias.

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GARY WRIGHT



GARY W. WRIGHT is Regional Managing Member of Wimberly Lawson Seale Wright & Daves, PLLC in the Knoxville, Tennessee office. He practices in the areas of labor and employment law, with a particular emphasis on NLRB work, collective bargaining, contract administration, and arbitration law. He has served on the Executive Council of the Tennessee Bar Association, Labor Law Section, and is a member of the Labor and Employment Law Sections of the Tennessee Bar Association and the American Bar Association. He is a Tennessee Supreme Court Approved Mediator and has received his Certification in Alternative Dispute Resolution from Cornell University, School of Industrial and Labor Relations. Prior to entering private practice, Gary was a federal prosecutor for the National Labor Relations Board working in its Peoria and Atlanta Regions. He has also served as an instructor of business law at Virginia Tech and Carson Newman College and is currently teaching in the University of Tennessee Professional Development Program. Gary received his BS degree, cum laude in 1974 and his J.D. degree in 1977, both from the University of Tennessee.

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SEXUAL STEREOTYPING FOUND WHERE MALE DISCREDITED IN HARASSMENT CASE



Kelly Campbell
 "The combination of these comments...was sufficient to permit a jury to find discriminatory intent on the part of the employer..."

An interesting twist on an old theme occurred in the recent case of *Sassaman v. Gmache*, 566 F3d. 307(C.A.2, 2009). A female co-worker accused a male of "harassing and stalking her" after she allegedly declined to have sex with him. The accused employee was given the option of resigning or being terminated.

During the limited investigation, the employer told the accused: "I really don't have any choice. [She] knows a lot of attorneys; I'm afraid she'll sue me. And besides you probably did what she said you did because you're male and nobody would believe you anyway."

After resigning, the accused employee then filed suit claiming discrimination in the form of male stereotyping.

The combination of these comments on the propensity of men to sexually harass women and the employer's failure to properly investigate the charges of sexual harassment against the plaintiff, was sufficient to permit a jury to find discriminatory intent on the part of the employer, the court concluded.

Editor's Note - While this case is rare, it is nevertheless a reminder to employers that occasionally the accused in a harassment case makes a legal claim against the employer. The claim might be that he or she is being disciplined in a discriminatory manner, or it might be that the accused has been defamed or a victim of intentional interference with employment. It is likely that the employer in the Sassaman case would have avoided liability, however, had it not made a statement that would allow a jury to conclude that it took action not because of the individual's situation, but because of an alleged propensity of males to sexually harass females.

"EEOC MEMORANDUM ON WAIVERS OF DISCRIMINATION IN EMPLOYEE SEVERANCE" continued from page 1

Due to the complexity in drafting a waiver agreement that satisfies all of these requirements mandated under the OWBPA, the sample waiver for exit incentive or other termination programs in the discussion of the EEOC memorandum is helpful. If the waiver agreement is not drafted in accordance with the strict OWBPA requirements, the waiver is invalid with respect to age discrimination, and an employee may accept the severance payment(s) and then nevertheless sue the employer for age discrimination.

THERE ARE TWO ADVANTAGES TO RECESSION - COST OF LIVING DROPS AND HEALTH IMPROVES



Brent Wilkins
 "An interesting question is why people improve their habits during bad economic times."

For the twelve month period ending on June 1, 2009, consumer prices declined 1.3%, the largest such decline since the twelve months ending in April 1950, the U.S. Department of Labor has reported. The largest single category of decline in prices is related to energy prices. As a result of the decline in the cost of living during 2009, there will be no cost of living increases in Social Security payments for 2010. Over the twelve months ending in August, 2009, overall consumer prices actually fell 1.5%.

..... The other benefit in the recession relates to health. It is a little known, but well documented fact, that death rates decline and healthy living habits improve in tough economic times. In fact, an economist at the University of North Carolina has documented that a one-percentage-point rise in the unemployment rate reduces the death rate by 0.5%. People live longer in recessions mainly because they become healthier, not because they face fewer external causes of death such as auto accidents. An important reason seems to be that people adopt smarter lifestyles in recessions, especially those people with the worst health habits. An interesting question is why people improve their habits during bad economic times. One reason seems to be the extra free time people have, giving them more time for exercise and sleep, which consequently has a positive impact on improving one's health.

A potential lesson from this is that healthy living should become more of a focus of our nation's efforts at healthcare reform. While recessions seem to reduce smoking, inactivity, and obesity, these same three things could be driven by healthcare policies as well.