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EMPLOYMENT SEPARATION AGREEMENTS

By: Matt W. Zeigler, Esq.

What is in a good employment separation agreement? What are the considerations that should go into the makeup of the release of an active employee from employment? Can you limit the time in which an employee has to renege on the agreement? What about the new amendments to the Handicap Discrimination Act, can those claims be released? Can the agreement be dovetailed with unemployment benefits which allow the payment of or the denial of weekly benefits?

There are a number of important considerations that comprise a good separation agreement. You will find herein, a discussion of some of them. Experience teaches that each situation, especially letting go longer tenured employees or employees that fall into the protected categories of the civil rights legislation, require careful attention. The benefits that such an agreement can provide are the easing of that employee out of the present position and having some level of assurance that there will not be litigation following the expiration of the payment of separation benefits.

A New Statute of Limitations. Recently, the 6th US Circuit Court of Appeals in Cincinnati upheld an agreement between an employer and an employee where the employee agreed that he would not commence any action or suit relating to his employment more than six months after termination of employment and waived any statute of limitations to the contrary. In the case of Myers v Western Southern Life Insurance Company, the employer asserted a written agreement that the 6-month limitation should prevent the prosecution of a former employee's claim brought 16 months following his termination of employment. The employer prevailed and prevented a former employee's claim for alleged violations of the handicap discrimination claim under the Elliott-Larson Civil Rights Act, and the Michigan Handicappers' Civil Rights Act.

In order to avoid this written agreement for a shorter limitation period, the Plaintiff must demonstrate that the waiver of the statute of limitations was not knowing and voluntary. The 6th Circuit found that the language in the Myers Case was quite clear and the Plaintiff's "self-serving affidavit" standing alone and without more proof was not sufficient to demonstrate that the waiver was not knowing and voluntary. Further, the Court held that the 6 months statute of limitations was not inherently unfair. Would a 3-month limitation period be unfair? That may depend on the overall terms of the separation agreement and the time that the employee has to consider the agreement.

Review Period. The separation agreement to enforce a shorter limitation of claims period would have an acknowledgement that the former employee has had sufficient time in which to review and consider his/her claim and to discuss it with his or her professional advisors. If an attorney or another professional advisor is brought in during the negotiation stage, have that professional sign an acknowledgement that these are the terms and conditions of the agreement. This is another impediment to a disgruntled employee changing their mind and bringing an action after receiving the benefits of the agreement.

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Arbitration. A separation agreement could provide that any and all disputes arising out of the employment of the former employee and/or under the terms of the separation agreement are required to be arbitrated under Rules of Commercial Arbitration of the American Arbitration Association at their local office. The benefits are a fairly speedy, less formal and, perhaps, less costly dispute resolution mechanism. The agreement can provide that any and all decisions made by the arbitrator would be final, binding and enforceable in any court of general jurisdiction. This can prevent the later relitigation of the same issues in court that were addressed in arbitration.

Reneging. For any former employee to renege on their settlement agreement, the law of the state of Michigan requires a timely tender or return of the benefits or money paid to them under the terms of the separation agreement. This is virtually a prerequisite to the commencement of litigation in order to attempt to set aside such an agreement.

Mutual Release Of All Claims. The mutual release language is, of course, the key to any such agreement. Not only should this language be broad, but it may even include language to waive rights under the amended Handicapper's Civil Rights Act. In order to have and knowing and informed waiver of that employee's rights under that Act, or the other employee rights acts, the settlement agreement should identify the rights that such employee is voluntarily waiving and identify those acts. The more rights that are identified, the more likely the release, if challenged, will be enforced; the more general the release language, the less strong the release.

Unemployment Benefits. The separation agreement can be coordinated with unemployment benefits such that an employee would not be able to collect such benefits during the payment of a certain portion of a separation package. Later, that same employee could be able to collect additional but much smaller employer-provided payments while still receiving Michigan Employment Security Commission ("MESC") benefits. The goal for the employer in easing out that employee, would be to provide a certain level of income to the employee (or perhaps the same net income level) made up of MESC benefits and a much smaller separation wage payable to that employee. The payment of the following types of wages generally prevents qualification for MESC benefits: weekly wages, continued salary for a definite period of time, or separation allowance paid on a regular basis. If the separation agreement specifically states that the payment of those benefits are specifically intended to disqualify a recipient from unemployment compensation, then it is probable that the Commission will respect the parties' written intention.

Further, the Commission may also respect the written intention of the parties where the employer intends that a certain continued salary is not intended to disqualify a former employee from MESC benefits. A use of this may be where the employer intends to provide a separated employee with the same net level of compensation that he or she received during employment, or, perhaps, a lower compensation rate. In this manner, an employee may receive a level of income comprised of both MESC benefits and some employer-provided income for an agreed period of time.

Conclusion. These are some of the options available to an employer when it may be necessary to terminate an employee who has special considerations. Since each situation must be judged on its own facts, then it is important to consult your professional advisors to determine the appropriate approach to each special employee.