COLLAZO FLORENTINO & KEIL LLP Client Advisory

For Clients And Friends Of The Firm

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Recent Legal Developments May Lead to Changes in Standard Separation Agreement Language

Employers should consider reviewing the language in the separation agreements offered to departing staff because of recent changes to New York's Unemployment Insurance Law and the EEOC's aggressive enforcement and litigation activities involving language that has generally been considered standard. In addition, due to the interplay between COBRA and the Affordable Care Act, employers should consider language in their separation agreements advising departing employees of their option to purchase post-employment health insurance through the state exchanges created by the Affordable Care Act, and the limitations on their ability to do so once they have elected to continue their health insurance coverage pursuant to COBRA.

Changes in New York Unemployment Insurance Law

A. Employer's Obligation to Respond to DOL Inquiries

On October 1, 2013, New York Labor Law § 581(e)(3) and its accompanying regulations were amended to require employers to respond to employment insurance claim notices from the New York Department of Labor ("DOL") within ten days. *See also* 12 N.Y.C.R.R. 472.12(a), (b). Employers' responses to the DOL must now provide "adequate information" by: (1) specifying the reason(s) for the separation, or other issues affecting the claimant's eligibility or entitlement for benefits; (2) answering, in good faith, all questions in detail; and (3) providing all relevant information and documentation for the Department of Labor to render a correct determination regarding the claimant's eligibility or entitlement for benefits. 12 N.Y.C.R.R. 472.12(f). The regulations also specify the potential penalties for employers who fail to provide timely and adequate responses. Specifically, an overpayment of benefits due to the employer's failure to provide a timely and/or adequate response to the DOL's inquiries will result in the employer's account and experience rating being charged for that overpayment. 12 N.Y.C.R.R. 472.12(g), (h).

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Under these amendments, an employer can no longer agree not to respond to the DOL's inquiries about the departing employee's unemployment insurance claim. Further, although employers may still agree not to contest a departing employee's unemployment insurance claim, the separation agreement should clearly reflect the employer's intention to provide timely and adequate responses to DOL inquiries.

B. The Effect of Severance Payments

Amendments to New York Labor Law § 591(6), which took effect January 1, 2014, could affect the timing of severance payments issued pursuant to a separation agreement. Under these amendments, an employee may not receive unemployment insurance benefits if he concurrently receives severance pay in excess of the state's maximum weekly unemployment benefit (currently, $405). This restriction applies even when the employee receives a lump sum severance payment in lieu of installment payments.

However, individuals who receive their first (or only) severance payment more than thirty days after their employment ends are not prohibited from receiving their full unemployment insurance benefits. This may influence the parties' negotiation over the scheduling of severance payments.

EEOC Enforcement and Litigation Activity

The EEOC has announced a national priority of preserving access to the legal system by targeting policies and practices that, in its view, "discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or that impede the EEOC's investigative or enforcement efforts." Among these targeted policies or practices are settlement provisions that, according to the EEOC, prohibit signatories from filing charges with the EEOC or providing information that would help the EEOC investigate or prosecute discrimination claims.

In two recent lawsuits that it filed against CVS Pharmacy, Inc. in the Northern District of Illinois (No. 1:14-CV-863) and CollegeAmerica Denver, Inc. in the District of Colorado (No. 14-CV-01232), the EEOC has claimed that the employers' form separation agreements are unenforceable and unlawfully interfere with employees' rights to file charges and participate in EEOC investigations. Although the precise claims differ in the two actions, the provisions under attack in the two lawsuits include the cooperation, non-disparagement, and confidentiality clauses, the general release

of claims, the "no pending actions" clause, the covenant not to sue, and the departing employee's required assurance that (1) except as compelled by law, the employee "will not assist any other private person or business in their pursuit of claims against the Company," and (2) the employee has disclosed (or is unaware of) any pending issues regarding the Company's non-compliance with regulatory requirements.

It is too early to predict the probable outcome of these lawsuits, but the EEOC has already begun to insist that settlement agreements it oversees comply with this policy priority. As a result, employers should review and consider modifying their template separation and release agreements to minimize the risk of later efforts to invalidate signed releases. Separation agreements should explicitly preserve the employee's legal right to communicate or cooperate with an administrative agency, and should not condition the employee's receipt of separation benefits on a waiver of that right. However, the agreement should also make clear that the employee waives his right to monetary relief in connection with any charge or complaint that might be brought against the employer on his behalf as a result of such communication or cooperation.

In addition, because the EEOC challenged the enforceability of CVS's separation agreement (five single-spaced pages) in part because it was allegedly too long and complex to be understood by the average employee – whatever one thinks of the merits of such an argument – employers should assess whether their separation agreements comply with the OWBPA's requirement that they be written in a manner calculated to be understood by their average employee.

<u>The Impact of the Affordable Care Act</u>

Employers are long accustomed to offering departing employees the option to continue their employer-provided health insurance at their own expense. Under the Affordable Care Act ("ACA"), however, departing employees may now also have the option of purchasing health insurance coverage through the ACA's state exchanges, which may present an opportunity to reduce health care expenses for both the departing employee and the employer. However, if an employee enrolls in COBRA, the employee may not be able to access the state exchange until the next open enrollment period. Therefore, employers should consider informing departing employees that once they enroll in COBRA, they will not be permitted to switch to an exchange insurance plan until the exchange's next open enrollment period.

We encourage you to review your severance agreements templates in consultation with counsel. Please contact Laura Monaco at (212) 758-7754, or any other attorney at the Firm, if you would like more information or assistance.