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A Client Alert from Paul Hastings

Responding to Recent Attacks on Releases

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A series of recent cases should be a wakeup call to employers reminding them just how vulnerable releases can be. These cases underscore the critical importance of

- Preserving claims that cannot be released as a matter of law.
- Preserving the right to file agency charges.
- Making releases understandable.
- Presenting employment termination program data in connection with ADEA releases in as unassailable way as possible.

Importance of Carving Out Unwaivable Claims

Most releases do an excellent job of releasing all known or unknown claims, but very few of them expressly preserve claims that the employer has no intention of denying (e.g., undisputed benefit plan claims). Even fewer expressly preserve claims that are unwaivable as a matter of law.

There are excellent reasons for these apparent flaws. A truly complete litany of preserved claims would be hard to compile (especially for multi-state employers), make the release harder to understand, and furnish litigious employees a compendium of claims still worth pursuing. A less defensible reason for not listing preserved claims is the *in terrorem* effect of broad release language.

Accordingly, it is quite common for releases to purport to waive, or at least fail to preserve, claims that generally are, or may be, unwaivable, such as FLSA, FMLA,[1] workers' compensation, California statutory indemnification claims or uncontested California wage-hour claims.[2] Until now, most employers and their attorneys assumed that employers would not reject claims that should have been preserved merely because an over-broad release waives them. Accordingly, employers, and their attorneys, generally assumed that there would be no adverse consequences from a release being over-broad. They expected that waivers of unwaivable claims would be unenforceable, but they generally assumed that the release's severability clause would keep the rest of the release enforceable. More cautious employers and attorneys worried that the entire release might be invalidated so as to discourage employers from using over-broad general releases to deter unwaivable claims from being asserted, but there was little case law justifying that concern until *Edwards v. Arthur Andersen LLP* (Cal. Dist. Ct. App., Aug. 30, 2006).

Edwards is an intentional interference with contractual advantage case. It had its genesis in Arthur Andersen's sale of a business unit in the wake of the Enron scandal. Employees of the unit Andersen sold had signed narrow non-competition/non-solicitation agreements (Non-Competes). The buyer was free to offer employment to any of the employees of the unit, but it conditioned employment on their releasing all claims against Arthur Andersen, in return for which it would release them from the Non-Competes. Because Edwards refused to release Andersen, the buyer did not employ him. Edwards then sued Andersen for interfering with his prospective economic advantage—employment with the buyer.

Edwards had a number of theories, such as that his Non-Compete was void under California law, making Arthur Andersen's effort to enforce it (by offering to cancel it in exchange for a release of claims) a "wrongful act," a required element for establishing an intentional interference tort claim. The appellate court agreed with this contention, but the important aspect of the decision as to the validity of releases involved an entirely separate claim: the release was so broadly written that it would have waived Mr. Edward's claims to statutory indemnity rights under California Labor Code Section 2802. California Labor Code Section 2804 voids any contract waiving those rights.[3] Edwards argued that asking him to sign a release that was void under Section 2804 so violated public policy that it constituted a "wrongful act" on which he could base an intentional interference claim. Again, the appellate court agreed.

Although *Edwards* does not hold that the entire release would have been void had Edwards signed it, the hostility the court expressed suggests that it might have reached that conclusion, rather than just voiding the release to the extent it would have waived statutory indemnity claims. We expect that plaintiffs seeking to entirely void over-broad releases will cite *Edwards* for that proposition, even if incorrectly.

Many claims besides California Labor Code Section 2802 indemnification claims may be unwaivable. In the absence of controlling authority to the contrary, exempting *specifically identified* unwaivable claims from a general release seems foolish. Any such list would provide a useful road map to litigious plaintiffs and would almost certainly incorrectly omit some unwaivable claims and perhaps even incorrectly include claims that can be waived. Therefore, the best approach, is simply to exempt "claims that cannot lawfully be waived" from the claims waived by a general release.

Preserving the Right to File Agency Charges

The EEOC takes the position that it is illegal for a release to bar a plaintiff from cooperating with EEOC investigations or filing EEOC charges, but not to bar a plaintiff from seeking personal relief for released non-ADEA claims.[4] The EEOC has taken this position in a number of reported and unreported decisions or enforcement actions, for example, in *EEOC v. Lockheed Martin Corp.*, ___ F. Supp. 2d ___, 2006 WL 2294540 (D. Md. Aug. 8, 2006).

Lockheed Martin arose out of a reduction in force (RIF). Lockheed Martin offered severance benefits in exchange for a general release. According to the EEOC, this constituted illegal ADEA retaliation for two reasons. The first reason was that the severance plan, according to the EEOC, did not condition benefits on execution of a release. Therefore, to insist that employees waive asserted EEOC claims in exchange for consideration to which they were already entitled was illegal retaliation. The second reason was that the covenant not to sue in the release barred agency claims too broadly, not permitting charges to be asserted as to released claims even if the individual was not seeking personal relief.

The moral of *Lockheed Martin* is to make sure that severance plans and policies expressly condition benefits on execution of the release of claims that the employer intends to demand (which those plans and policies customarily would do), and to make sure that the covenant not to sue does not bar signatories from cooperating with agency investigations or from filing charges with government agencies that do not seek personal relief for released claims. Writing such a covenant not to sue is not as easy as one might think, for the reasons discussed in the next section.

Critical Need for Understandability

For a release of employment-related claims to be enforceable, it normally must to be "knowing and voluntary." If releases are not easy to understand, persons signing them may seek to invalidate them as failing to meet the "knowing and voluntary" standard. Indeed, under ADEA (one of the very few statutes that explicitly establishes minimum standards for releases), "a waiver may not be considered knowing and voluntary unless at a minimum . . . [it] is written in a manner calculated to be understood by [the person waiving ADEA claims], or by the average individual [participating in an employment termination program]." 29 U.S.C. § 626(f)(1).

In a series of recent cases against IBM, courts have held that its ADEA release form did not satisfy the ADEA's "understandability" requirement. *See Syverson v. IBM,* __ F.3d ___ (9th Cir. Aug. 31, 2006) and *Thomforde v. IBM,* 406 F.3d 500 (8th Cir. 2005).

The precise issue in these IBM cases was the interaction between the IBM release's clear and explicit ADEA waiver and its covenant not to sue. That covenant exempted ADEA claims to comply with EEOC regulations that prohibit releases from including provisions that impose penalties (such as attorneys' fees incurred in defending a suit brought in violation of the covenant not to sue) on persons who challenge the validity of their ADEA waivers. The problem, the plaintiffs argued, was that the express exemption of ADEA claims from the IBM release's covenant not to sue contradicted that release's clear and explicit ADEA waiver. For that reason, the *Syverson* and *Thomforde* courts held that, as to the average prospective signatory, IBM's release violated the ADEA's "understandability" requirement.

Even if IBM ultimately prevails in these still pending cases, they underscore how difficult it is to make releases unambiguous and understandable when dealing with complex concepts, such as covenants not to sue.

ADEA Employment Termination Program Data Disclosure

In order to obtain a valid ADEA release in connection with an "employment termination program," special data disclosure requirements must be satisfied. The requirements are ambiguous, making it all too easy for plaintiffs to claim that the ADEA releases they signed are void because of disclosure errors. Several recent cases underscore how important it is to structure ADEA data disclosures in a way that minimizes plaintiffs' ability to second-guess their correctness. Delineation of "decisional units" is an especially critical issue. For more information, see our recent client alert discussing one of these cases (http://www.paulhastings.com/publicationDetail.aspx?PublicationId=542).

Recommendations

Employers should review their releases forms to ensure they preserve unwaivable claims, permit signatories to participate in agency investigations and to file charges (except for personal relief as to released non-ADEA claims), and are as unambiguous and understandable as possible, especially covenants not to sue. Employers also should make sure that they comply with

the ADEA release data disclosure requirements when seeking ADEA releases in connection with employment termination programs.

For example,

- To enhance understandability, consider eliminating covenants not to sue.
- To preserve unwaivable claims, a release might state that "this General Release does not release any claims that I cannot lawfully release."
- To avoid retaliation claims, a non-ADEA release might state that "this General Release does not prohibit me from filing a charge with any government administrative agency (such as the EEOC) as long as I do not personally seek reinstatement, damages, remedies, or other relief as to any claim that I have released, any right to which I hereby waive.

Notes

1. See Taylor v. Progress Energy, Inc., 415 F.3d 364 (4th Cir. 2005) (holding that in the absence of prior approval from the U.S. Department of Labor or a court, the following language in 29 C.F.R. § 825.220(d) prohibits a prospective or retrospective waiver of substantive and proscriptive FMLA rights: "Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA."), *vacated*, 2005 U.S. App. LEXIS 15744 (4th Cir. 2006); but see Faris v. Williams WPC-I, Inc., 332 F.3d 316, 322 (5th Cir. 2003) (holding that the quoted prohibition extends only to waivers "of substantive rights under the statute, such as rights to leave, reinstatement, etc., rather than to a cause of action for retaliation for the exercise of those rights").

2. *See* Cal. Labor Code § 2804 ("Any contract or agreement, express or implied, made by any employee to waive the benefits of this article or any part thereof, is null and void. . . .").

3. Interestingly, the *Edwards* opinion did not discuss whether, in light of the reference to "employee" in California Labor Code Section 2804, the statute's release proscription applies to former employees.

4. *See*, e.g., EEOC Notice No. 915.002 (Apr. 10, 1997).

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