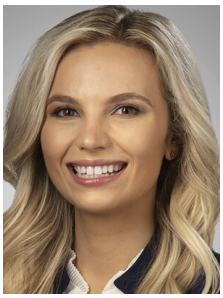
Reviewing Separation Agreement Compliance Before Layoffs

By **Victoria Hubona** (December 2, 2022)



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As economists argue whether a recession is on the horizon, some employers may begin preparing to cut expenditures, including through a reduction in force.

While not necessary under most state laws, many employers opt to provide severance to employees they choose to lay off. This severance is usually provided by way of a separation agreement in exchange for the employee's agreement not to bring certain claims against the employer, among other things.

As employers begin determining whether they will undergo a reduction in force, they should ensure their separation agreements adhere to applicable state laws.

For example, in March, Oregon Gov. Kate Brown signed S.B. 1586 into law.[1] This bill expands Oregon's Workplace Fairness Act, with the amendments taking effect on Jan. 1, 2023. Currently under the act, a separation agreement cannot include a nondisclosure or a nondisparagement provision preventing the employee from discussing discrimination detailed under Oregon Revised Statutes Sections 659A.030, 659A.082 or 659A.112 unless the employee requests the inclusion of such provision(s) in the agreement.

Further, a separation agreement may also not include a no-rehire provision unless the employee similarly requests the inclusion of the provision in the agreement. If the employee elects to include such provisions in the agreement, the act requires employers to provide all employees, regardless of age, seven days to revoke the agreement after executing it, and the agreement must clarify as much.

S.B. 1586 amends the act and prohibits employers from including confidentiality provisions concerning the amount of, or the fact of, any settlement. The existing seven-day revocation period now also applies if such a confidentiality provision is included in an agreement.

Employers are further prohibited from making an offer of settlement or separation conditional upon an employee requesting to include any of these restricted nondisclosure, nondisparagement, no-rehire or confidentiality provisions. Additionally, employers seeking to enter into a settlement or separation agreement must provide employees with a copy of their anti-discrimination policy.

The law affords individuals aggrieved under the act a private right of action, and they may recover a civil penalty of up to $5,000 as well as reasonable attorney fees. Additionally, any restricted provisions agreed to in violation of the act are considered void and unenforceable.

Aside from Oregon, multiple states have certain requirements and restrictions that affect the construction of separation agreements.

For example, under Minnesota's Human Rights Act, employers must provide all employees, regardless of age, at least 15 days to revoke an executed agreement if such agreement contains a release of claims. And, Illinois prohibits employers from including any clause that prevents an employee from making truthful statements or disclosures regarding unlawful employment practices.

While this does not cover the gambit of state laws requiring and restricting what an employer must include in a separation agreement, employers should be cautious as they begin rolling out their separation agreements.

Additionally, as reductions in force continue, employers should be cautious of new and pending laws potentially affecting their separation agreement templates.

For example, currently pending in New York are two bills that, if enacted, would:

- Invalidate any release of claims involving unlawful discrimination where the departing employee is required to pay liquidated damages or forfeit all or part of a separation payment for violation of a nondisclosure clause or nondisparagement clause, or where the agreement contains an affirmative statement, assertion or disclaimer that the employee was not subject to discrimination, harassment or retaliation; and

- Invalidate any releases of claims where the agreement includes a no-rehire provision.

To ensure adherence to applicable state laws when drafting a separation agreement, employers should first determine the types of claims they would like their employees to release. Certain types of claims are prohibited from being released by state or federal law. For example, many states prohibit releasing claims involving unemployment compensation, workers' compensation and unpaid wages.

Employers should also take care to review any prior employment agreements executed by any employees it is considering for separation. Primarily, it is important to consider if severance or any other form of termination pay or benefits has already been laid out in a prior agreement. It is also crucial to understand the scope of any restrictive covenants included in a prior employment agreement that may be applicable to a separation agreement.

The separation agreement may serve as an opportunity for an employer to remind a departing employee of his or her obligations pursuant to a previously executed employment agreement, such as adhering to a valid noncompete or nonsolicit clause.

An employer may also choose to use the separation agreement as a way of attaching a noncompete or nonsolicit provision to a departing employee in the event a prior employment agreement did not contain such provision. If an employer chooses to include one of these provisions in a separation agreement, it must ensure it is supported by valid consideration and meets the requirements of applicable state law.

Many states impose stringent requirements concerning restrictive covenants that if not met, can invalidate such covenants. For example, numerous states, such as Illinois, Maryland, Nevada and Oregon, prohibit noncompete or nonsolicit provisions where the employee at issue is a low-wage employee, as defined by applicable state law, or an hourly employee. If an employer chooses to include a restrictive covenant in its separation agreements, it is necessary to further include severability and so-called blue pencil clauses to protect its provisions and agreements as much as possible.

Additionally, an employer may consider adding a no-rehire provision in a separation

agreement to protect itself in the event a departing employee applies for another job at the company and claims discrimination when not hired. In the event such a provision appeals to an employer, it must ensure applicable state law does not prohibit such a provision or tie certain restrictions or requirements to such a provision, such as in California, Oregon and Vermont.

In addition to separation agreements, employers should not lose sight of state-required notices and information that need to be provided to departing employees. Many states, including Arizona, California, Colorado, Georgia, Nevada and others, require employers to provide information generally concerning unemployment benefits, a formal notice of termination and the employee's rights pursuant to the applicable state's laws.

In addition, employers must follow state law concerning the payout of unused sick time, vacation time and the like and consult any previously documented payout plans, whether in employment handbooks or previously executed employment agreements, to ensure compliance where applicable.

The landscape of the legality of provisions typically included in separation agreements is constantly changing. As reductions in force continue to occur, employers should begin reviewing their separation agreement templates to ensure they provide the desired protections for the employer while complying with applicable state laws.

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[1] https://olis.oregonlegislature.gov/liz/2022R1/Downloads/MeasureDocument/SB1586/Enrolled.