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EMPLOYER ALERT
April 2014

Update on Severance Agreements

THE EEOC'S LATEST TARGET – SEVERANCE AGREEMENTS *by Adam Long*

Employers have long offered employees severance or other post-employment benefits in exchange for a waiver and general release of claims. Agreements of this kind often help make a difficult separation somewhat easier. By providing severance or other consideration to a departing employee, employers can obtain a release of claims to ensure finality and no future litigation or trouble from the departing employee. Or so they thought.

Even if employees waive and release claims under the employment discrimination laws in a severance agreement, employees retain the right to file charges of discrimination with the Equal Employment Opportunity Commission (EEOC) pursuant to the EEOC's "policing" powers. In essence, employees can waive their right to any monetary recovery from such charges, but they can not lawfully waive their right to file a charge or participate in an investigation. In the 2000s, the EEOC had blessed severance agreement language that made clear that the employee would not be entitled to any monetary recovery relating to EEOC claims, so long as the agreement did not prohibit the employee from filing a charge or participating in an investigation. While employees retained the right to file charges after signing the severance agreement, very few did, as they had no financial incentive to do so.

Recently, the EEOC has taken a new and aggressive approach to what it has labeled "overly broad waivers" and "settlement provisions that prohibit filing charges with the EEOC or providing information to assist in the investigation or prosecution of claims of unlawful discrimination." See EEOC Strategic Enforcement Plan FY 2013-2016 at http://www.eeoc.gov/eeoc/plan/sep.cfm.

In May 2013, the Chicago District Office of the EEOC settled litigation that it had filed against Baker & Taylor, Inc. over language in its form severance agreement. As part of this settlement, Baker & Taylor agreed to include language in its future severance agreements that went well beyond the language previously blessed by the EEOC. This new language included confirmation that employees retain the right to file a charge with and participate in any charge investigation by the EEOC or a comparable state or local agency and "to recover any appropriate relief" as part of this process.

In February 2014, the Chicago District Office filed a lawsuit against CVS Pharmacy, Inc., claiming that its form severance agreement was "overly broad, misleading and unenforceable." In its complaint, the EEOC emphasized that the agreement at issue was five pages, single spaced, and claimed that numerous provisions in the agreement violated Title VII, including:

- A non-disparagement provision that prohibited the employee from making disparaging statements about the business or reputation of CVS and its officers, directors, and employees.
- A confidential information clause that prohibited the employee from disclosing to any third party any of CVS's confidential information.
- General release language that included a release of "any claim of unlawful discrimination of any kind."
- A general covenant not to sue.

The EEOC noted that the agreement's covenant not to sue paragraph included the following language:

> Nothing in this paragraph is intended to or shall interfere with Employee's right to participate in a proceeding with any appropriate federal, state or local government agency enforcing discrimination laws, nor shall this Agreement prohibit Employee from cooperating with any such agency in its investigation.

The EEOC believes that this qualifying language, which closely tracked language that the EEOC previously

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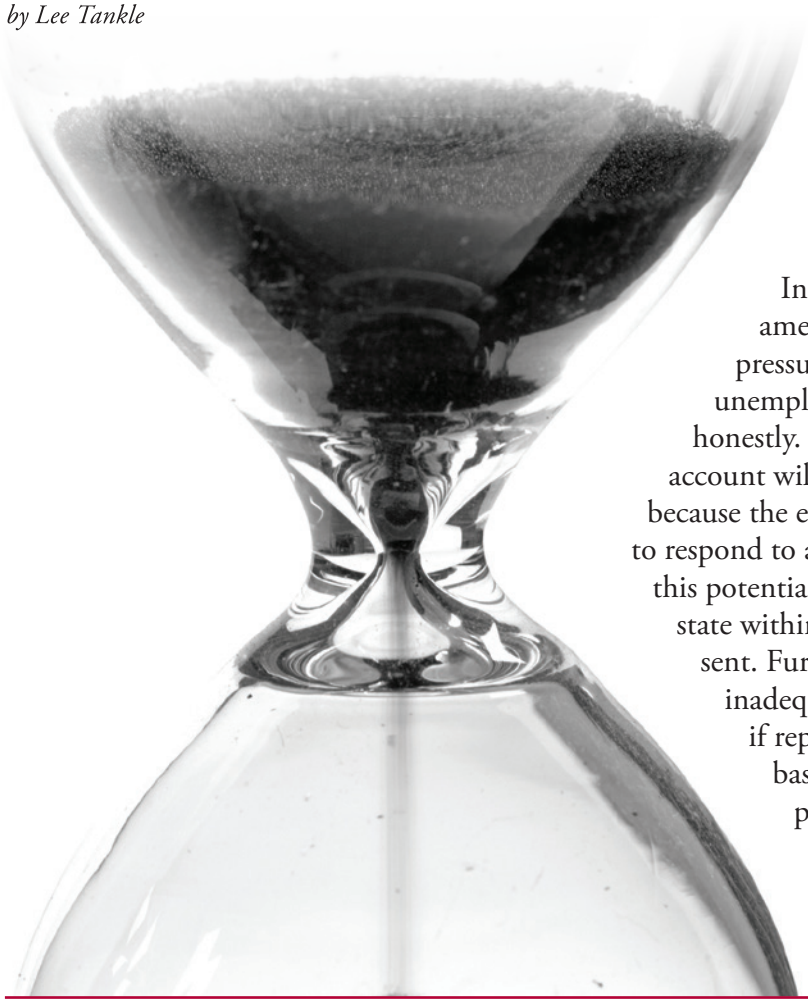
CHANGES TO PENNSYLVANIA'S UNEMPLOYMENT COMPENSATION LAW MAY REQUIRE EMPLOYERS TO PROVIDE RESPONSE TO UNEMPLOYMENT INFORMATION REQUESTS

by Lee Tankle



Some changes in Pennsylvania's Unemployment Compensation Law (the "UC Law") have sparked debate as to how the changes may impact employers.

In response to a federal mandate, Pennsylvania amended the UC Law in late 2013 to put additional pressure on employers to respond to requests related to unemployment compensation—and to do so timely and honestly. Specifically, the law provides that an employer's reserve account will be charged for overpayments paid to claimants because the employer responded in an untimely fashion or failed to respond to a request for information from the state. To avoid this potential charge, an employer must file a response with the state within fourteen days after the request for information is sent. Furthermore, an employer's response will be considered inadequate if "the response misrepresents or omits facts that, if represented accurately or disclosed" would have been the basis for denying a claimant benefits. The UC Law also provides that a person who makes a false statement, misrepresentation, or omission of a material fact to obtain or increase UC benefits for himself/herself or for another person can be convicted of a summary offense and subject to fines and imprisonment.

SUPREME COURT CLARIFIES THAT SEVERANCE PAYMENTS ARE TAXABLE *by Tony D. Dick*

On March 25, the U.S. Supreme Court ruled unanimously (Justice Kagan recused) in *United States v. Quality Stores, Inc.*, Case No. 12-1408, that severance payments made to employees who were involuntarily terminated are taxable wages under the Federal Insurance Contributions Act (FICA). At issue was the definition of "wages" under FICA. In the opinion written by Justice Kennedy, the Court held that based on the broad definition of wages under FICA, the legislative history of FICA, and other relevant provisions of the Act, the severance payments at issue were, in fact, subject to FICA taxes.

The decision overturns a previous ruling from the Sixth Circuit Court of Appeals in favor of Quality Stores which was seeking a $1 million tax refund from the IRS based on its claim that severance payments were not covered by FICA, but confirms an earlier holding of the Third Circuit Court of Appeals. We had been advising clients in the Third Circuit (which includes Pennsylvania, New Jersey, Delaware and the U.S. Virgin Islands), to withhold FICA taxes on severance payments and that requirement is now the law throughout the United States. ■

So what does this really mean? Many employers often elect not to respond to the initial request for information from the UC Service Center to avoid further conflicts with the former employee or as part of a formal separation agreement that includes a waiver of the former employee's claims against the employer. These separation agreements often contain language along the lines of "for consideration of the promises set forth in this Agreement, Employer agrees that it will not contest Employee's application for unemployment compensation benefits."

However, an employer's failure to respond to the UC Service Center's initial request for information could present a potential conflict with Pennsylvania's amended UC Law, as the Employer could be making a promise to an employee it cannot (or at least should not) keep. For example, if an employee has committed an act of willful misconduct or voluntarily resigned and is receiving a severance package as part of his/her termination, the employer could not keep its promise to "not contest" the employee's application for benefits and truthfully respond to a request for information from the state. If an employee is terminated due to willful misconduct or quits without necessitous and compelling cause, he/she may be deemed ineligible for unemployment benefits.

So long as the employer responds truthfully to the request for information, it should not have any further obligation to contest the claim. Thus, if the employee's claim for benefits is denied by the UC Service Center and the employee files an appeal, the employer should have no obligation to attend a subsequent Referee's hearing.

Employers no longer can choose whether and when to respond to requests for information from the UC Service Center without creating potential risk. With the evolving unemployment compensation landscape, employers should reconsider how they approach the UC question with separating employees, especially in situations involving formal separation agreements. ■

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blessed, does not save the other provisions of the agreement that it believes are overly broad and unlawful.

In response to the filing of the complaint, CVS has stated that it believes that its form severance agreement is lawful and that it intends to contest the EEOC's claims.

Where Are We Now?

In light of the EEOC's current Strategic Enforcement Plan and the Baker & Taylor and CVS cases, what once was relatively uncontroversial language in severance agreements now may give rise to increased scrutiny or even litigation. By essentially rejecting disclaimer language it blessed less than 10 years ago, the EEOC has created uncertainty for employers who are seeking (and willing to pay for) finality and certainty with former employees in the form of a severance agreement and general release of claims.

Employers should watch the CVS litigation to see if CVS elects to fight and obtain an adjudication on the merits rather than settle. Courts ultimately may reject the EEOC's current position on severance agreement language. Unless and until that occurs, employers who regularly use severance agreements should review those agreements closely to see whether and to what extent their form agreements contain language similar to the provisions challenged by the EEOC in the CVS litigation. Now is the time to review and consider refreshing those agreements, with the following principles in mind:

- Shorter and simpler agreements generally are better in most situations.
- The agreement should emphasize the employee's right to file administrative charges and participate in investigations by government agencies.
- Any blanket non-disparagement and non-disclosure of confidential information provisions should include language making clear that these provisions do not apply to the employee's right to file charges and participate in investigations.
- Revisit language mandating cooperation with the employer after separation to ensure that any cooperation obligations do not infringe on these protected rights.
- Proceed with caution on any covenant not to sue, as such covenants can run afoul of these rights if inartfully drafted and may excessively complicate the agreement even if well drafted.

Severance agreement remain a viable tool for employers. The EEOC's recent actions have increased the risk associated with their widespread use, especially for employers using dated or very aggressive forms. These agreements can be drafted in a way to minimize such risk while accomplishing much of what the employer seeks when offering severance in exchange for a release of claims. ■

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