

New EEOC Guidance On Separation Agreements

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Carlton Fields **Labor and Employment Law Practice Group** alert: **New EEOC Guidance On Separation Agreements** On July 15, 2009, the EEOC offered new guidance relating to separation agreements that provide severance pay in exchange for a release of claims.

For the most part, the new EEOC memorandum is consistent with past precedent, and does not represent a break from prior case law and regulations. The guidance document, however, does provide a timely reminder of the numerous requirements that a release of federal age discrimination claims must satisfy, and the precision required to meet those requirements. For example, unlike other discrimination laws, where a release in a separation agreement need only be knowing and voluntary, federal age discrimination legislation requires, among other things, that the employee be provided at least 21 days to consider the release (which can be waived) and 7 days to revoke it (which cannot be waived).

One example in the new EEOC guidance document shows how specific the language of a release must be. The federal statute provides that the release of an age claim is not valid unless “the individual is advised in writing to consult with an attorney prior to executing the agreement.” According to the new guidance document, the EEOC will give a very strict reading to this provision. The guidance document states that the following language is insufficient: “I have had reasonable and sufficient time and opportunity to consult with an independent legal representative of my own choosing before signing this Complete Release of All Claims.” That is, even though the release language showed the parties clearly were discussing and considering the use of lawyers, the language was insufficient because it did not explicitly advise the individual to consult with an attorney. Clearly this is an area of law which poses traps for the unwary.

The EEOC guidance document also explains the complex requirements for federal age discrimination releases in the context of a reduction in force, or “RIF.” In a RIF, the consideration time frame changes from 21 days to 45 days, and the employer must provide demographic or statistical

information relating to employees considered for the RIF. The demographic information must be very detailed and specific, and if it fails to set those details out adequately, all the releases in the RIF will be invalid. That is, the RIF'd employees will have received severance, but can still bring actions for age discrimination.

If you have any questions regarding this alert or would like assistance in connection with a separation agreement, please contact any member of the Carlton Fields **Labor and Employment Law Practice Group**, or the attorney in the firm with whom you are in regular contact.

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