Jan. 8, 2024 Issue 1

Separation Agreements Under Attack

Happy New Year!

This week's Monday Minute focuses on employee separation agreements.

Most executives and human resources professionals are familiar with this important risk-mitigation tool, through which a terminated employee waives their possible legal claims against their former employer in exchange for severance pay. Too often, companies look at these agreements as "forms"—static and unchanging. Please don't fall into this trap.

Carefully review and consider agreements for each and every termination.

Separation agreements are complicated legal documents that, if not drafted carefully, can introduce new risk to employers. Key language for separation agreements can vary considerably depending on the employee's age, the employee's position (including whether the employee is part of management), whether the separation is part of a RIF/layoff, and how/when compensation will be received by the employee (potentially triggering "deferred compensation" and other tax rules). The terms of a separation agreement should be carefully reviewed for *each* terminated employee or RIF/layoff.

Separation Agreements have the attention of government regulators.

Reviewing separation agreements is especially important as government regulators focus greater attention to the enforceability of separation agreements. In 2023, **the NLRB determined that overbroad confidentiality and non-disparagement provisions violate the National Labor Relations Act** because they restrict employees from engaging in protected activities. **Last year, the SEC also fined a private company** for using separation agreements that required terminated employees to waive their right to monetary whistleblower awards for participating in government investigations.

In other words, core separation agreement terms that might have once been considered "standard"—confidentiality, non-disparagement, and release provisions—must now be narrowly tailored so as not to restrict employees from engaging in legally protected activities.

Sometimes, the juice isn't worth the squeeze.

In many cases, the risks of including confidentiality or non-disparagement provisions will outweigh the possible benefits. Before including such a provision, consider the following: Does the employee truly possess confidential or proprietary information? Would the employee's public comments actually impact the company's reputation? Sometimes, the juice isn't worth the squeeze.

**This client alert is for informational purposes and is not legal advice.*

Thank you for taking a minute to reflect on how you are using and thinking about separation agreements. if you have any questions, **please contact our employment practice team members**.

Email Steve Metzger

Email Brandon Wharton

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