

“Sleep Insurance” Severance Agreements

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Does your company utilize severance agreements with employees – paying severance in exchange for the employee waiving their right to bring any kind of action against the company in the future? Such agreements have become even more common as employers see the rising number of lawsuits being filed and try to avoid the rising costs that go with them. I had a client that used to refer to severance agreements as “sleep insurance” – as in, knowing that an exiting employee had signed a severance agreement and waived any rights to sue the company allowed him to sleep at night.

If using severance agreements, however, there are several rules that you need to follow. Specifically, there are rules for severance agreements for individuals the age of 40 or over that are waiving age discrimination claims. Why 40 and not some other age? Ask Congress, as they are the body that set the age-40 benchmark as part of the Older Workers Benefit Protection Act (OWBPA).

The OWBPA requires severance agreements offered to individuals that are at least 40 in exchange for a release of claims to be written in plain English (as all should, but the OWBPA makes this a statutory requirement). It also requires that the employer specifically advise the employee that they have the right to have the agreement reviewed by an attorney. The OWBPA also mandates that the offer of severance be open for at least 21 days (45 days if this is a group termination such as a reduction-in-force) and gives the separating employee at least seven days to revoke their agreement.

Importantly, none of these OWBPA requirements apply if the separating employee is under the age of 40. Accordingly, I recommend having different versions of severance agreements for those 40 and over and those under 40 years old.

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