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REDUCE POTENTIAL EXPOSURE FOR EMPLOYMENT-RELATED LAWSUITS

A SIMPLE MODIFICATION TO EMPLOYMENT APPLICATIONS MAY DO THE TRICK

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SUMMARY

The purpose of this alert is to apprise our clients of a fast, simple, and inexpensive way to substantially reduce their exposure to certain types of employment-related claims through the inclusion of an express waiver ("Waiver") in a form employment application or other document signed by applicants or employees.

One simple sentence on an employment application or in an at-will employment agreement may be the easiest cost-savings measure for legal claims. Employers go to great lengths and expense to reduce their potential exposure to employment-related claims. Most employers implement employment policies to address the ever-growing myriad of federal, state, and local employment laws, regularly conduct employee EEO training, hire qualified human resources professionals and in-house attorneys with expertise in employment law, and regularly seek advice and assistance from outside counsel concerning these prophylactic measures.

The Waiver is designed to contractually reduce to six (6) months the time period within which certain types of employment-related claims must be filed and waives any statute of limitations to the contrary, thereby significantly reducing the number of timely-filed claims and, consequently, the employer's potential exposure.

Recently, the Waiver has made legal headlines following the Fifth Circuit Court of Appeals' decision in *Harris v. FedEx Corporate Services*.[1] The use of the Waiver saved FedEx over $365 million after the Fifth Circuit agreed with FedEx that language in Harris' at-will employment contract shortened the statute of limitations period on a claim under 42 U.S.C. § 1981 ("Section 1981"). Harris' employment contract included a "Limitation Provision" which stated "[t]o the extent the law allows an employee to bring legal action against the Company, [Harris] agrees to bring that complaint

within the time prescribed by law or 6 months from the date of the event forming the basis of [her] lawsuit, whichever expires first." *Id.*

Following her termination, Harris filed suit under 42 U.S.C. 1981 ("Section 1981") for retaliation and discrimination. She later amended her complaint to include claims under Title VII as well. FedEx moved to dismiss the Section 1981 claims, arguing they were time-barred under the Limitation Provision in the employment agreement. The district court denied the motion, finding the Limitation Provision was "against public policy." The Section 1981 claims and the Title VII claims both proceeded to a jury trial, and Harris prevailed.

The jury awarded Harris $120,000 for past pain and suffering and $1,040,000 for future pain and suffering. It also awarded an additional $365,000,000 in punitive damages. Critically, the size of the award was only possible due to the inclusion of the Section 1981 claims. Under its implementing legislation, Title VII claims are subject to a statutory cap of $300,000 (including punitive damages). Juries cannot award a plaintiff more than the statutory maximum under Title VII. However, Section 1981 claims have no such limits on exposure – resulting in the jury's ability to award massive punitive damages.

On appeal, the Fifth Circuit reversed the district court's denial of the motion to dismiss the Section 1981 claims, recognizing that courts have routinely permitted contractual agreements to limit the time period for bringing an action, so long as the limitation is reasonable.[2] The six (6)-month period contained in the FedEx agreement was not inherently unreasonable.[3] After dismissing the Section 1981 claims, the Fifth Circuit held that Harris' award could not exceed $300,000 and the award was remitted to $248,619.57. FedEx avoided $365 million in damages because they implemented the Waiver.[4]

WHICH CLAIMS SHOULD BE INCLUDED IN THE WAIVER?

The employment-related claims that subject employers to the most potential exposure are those that carry lengthy limitations periods and no damages caps. As discussed above, Section 1981, which prohibits race discrimination and retaliation, has a four (4)-year statute of limitations and does not cap emotional distress or punitive damages.[5] State common law also provides a source for employment-related breach of contract and tort claims, such as defamation, intentional infliction of emotional distress, negligent hiring / retention / supervision, and invasion of privacy (the "Common Law Claims"). While the elements and limitations periods of Common Law Claims differ from state to state, they generally carry a one (1) to four (4)-year limitations period and unlimited emotional distress and punitive damages.[6] Many state anti-discrimination statutes also have limitations periods in excess of six (6) months, do not cap damages, and do not require an employee to exhaust administrative remedies through the filing of an administrative charge with a state agency (the "State Anti-Discrimination Claims").[7]The courts have consistently upheld an

employer's right to contractually reduce to six (6) months the limitations periods for Section 1981 Claims, Common Law Claims, and State Anti-Discrimination Claims.[8] Thus, such claims should be included in the Waiver.

While claims asserted under the Family and Medical Leave Act (FMLA), the Fair Labor Standards Act (FLSA), and the Equal Pay Act (EPA) typically do not permit emotional distress damages and limit punitive damages (also known as "liquidated damages") to the amount of the back pay award, they carry a two (2)-year limitations period which can be extended to three (3) years in the case of a willful violation.[9] There is a split in authority at the district court level as to whether the limitations periods for FMLA (and, by analogy, FLSA and EPA) claims may be contractually shortened.[10]However, at least one appellate court has held the Waiver unenforceable under the FLSA, reasoning that employees cannot waive their FLSA rights, which is what the Waiver effectively did.[11]Given the relative uncertainty that remains for these claims, employers including FMLA, FLSA, and EPA claims in their Waivers also should include a severability clause providing that the illegality or unenforceability of any part of the Waiver shall have no effect upon, and shall not impair the enforceability of, any other part of the Waiver.

WHICH CLAIMS SHOULD BE EXCLUDED FROM THE WAIVER?

The U.S. Equal Employment Opportunity Commission (EEOC) is charged with investigating and enforcing the most common statutory employment claims, including those asserted under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act (the "EEOC Claims"). Although most of the EEOC Claims allow a successful plaintiff to recover back pay, front pay, emotional distress damages, punitive damages, and attorneys fees, these claims offer two significant advantages to employers in comparison to the other employment-related claims discussed above. First, an individual may not file an EEOC Claim in court unless and until he or she first has exhausted available administrative remedies – i.e., filed an administrative charge with the EEOC or comparable state agency, typically within 300 days of the alleged violation,[12]and received a Notice of Right-to-Sue from the EEOC.[13]Thus, the EEOC Claims already carry a relatively short limitations period (i.e., 300 days). Second, the combined recovery of emotional distress and punitive damages under the EEOC Claims, to the extent such damages are available at all under the relevant statute, may not exceed the applicable statutory cap ($50,000-$300,000, depending on the size of the employer).[14]Because the administrative exhaustion process typically takes more than six (6) months to complete, the courts have uniformly refused to enforce contractual provisions that attempt to shorten the 300-day limitations period for such claims.[15]Accordingly, the Waiver should expressly exclude EEOC Claims from its coverage.

SHOULD A CHOICE-OF-LAW CLAUSE BE INCLUDED?

The courts will apply applicable state law in determining whether a Waiver is enforceable. Whether a choice-of-law clause in the Waiver is enforceable will depend on a number of fact-specific considerations including the source of the limitation period sought to be shortened, which state's choice-of-law principles are applicable, whether application of the chosen state's law would undermine the public policy of the state in which the action is pending, and the relationship between the parties and the state that is the subject of the choice-of-law provision.

That said, there is little downside to including a choice-of-law clause in the Waiver, especially when a severability clause of the type described above also is included. If the choice-of-law provision is enforceable, including it will increase both predictability of outcome and the likelihood of the Waiver's enforceability (as the employer no doubt will have selected a state with favorable law concerning the shortening of limitations periods). But keep in mind that the likelihood of a court enforcing a choice-of-law clause will depend on the nature of the relationship between the parties and the state that is the subject of the choice-of-law clause. This analysis can be especially complex when an employer has employees in multiple states. For additional guidance concerning the inclusion of a choice-of-law clause in the Waiver, please contact a member of Bryan Cave's Labor & Employment Client Service Group.

HOW SHOULD THE WAIVER BE IMPLEMENTED?

While the Fifth Circuit summarily dismissed the employee's assertion that she did not know her employment contract included the Limitation Provision –because parties are charged with knowing the terms of an agreement they signed—other courts may be less willing to do so. To overcome such objections, the Waiver should be included in a form employment application and should be clear, explicit, and conspicuous. Highlighting the limitations provision can be accomplished through bold font, italic font, capital letters, a heading placing the reader on notice of the importance of the provision, and any other means that accentuate the provision. Highlighting the Waiver will increase the likelihood of a court finding that the waiver was made knowingly and voluntarily, which many states consider to be a prerequisite to the contractual shortening of a statutory limitations period.[16]

Employers also may wish to have their current employees execute an agreement containing a Waiver. A court examining the enforceability of a Waiver under these circumstances is likely to question whether any consideration was offered to the current employee in exchange for the employee's waiver. Whether the employee's continued employment alone constitutes adequate consideration for such a Waiver will depend on applicable state law and, in some states, how long the employee remains employed following the execution of the Waiver and whether the employee's separation from employment was voluntary.[17]Employers who prefer more predictability concerning the enforceability of Waivers against current employees should offer their current employees a form of consideration other than mere continued employment in exchange for their execution of the Waiver, such as a small monetary payment or other benefit to which the employee is not otherwise entitled.

Employers who ask union employees to sign a Waiver as a condition of continued employment may face an additional hurdle under the National Labor Relations Act (NLRA). The NLRA requires that before any changes are made with respect to employees' wages, hours, terms, or conditions of employment, such changes must first be negotiated with the incumbent union. Thus, a union may have a basis under the NLRA to argue that the requested Waiver is in fact a change in a term or condition of employment, thereby foreclosing the company from unilaterally imposing a requirement that employees execute a Waiver as a condition of continued employment.[18]

If you would like assistance drafting and/or implementing a Waiver, please contact a member of BCLP's Employment & Labor Practice Group.

FOOTNOTES

[1] *Harris v. FedEx Corporate Services*, 92 F.4th 286 (5th Cir. 2024).

[2] "'[I]t is well established that . . . a provision in a contract may validly limit . . . the time for bringing an action on such contract to a period less than that prescribed in the general statute of limitations, provided that the shorter period itself shall be a reasonable period.'" *Id. citing Order of United Com. Travelers of Am. v. Wolfe*, 331 U.S. 586, 608 (1947); see *also Heimeshoff v. Hartford Life & Accident Ins. Co.*, 571 U.S. 99, 107 (2013) (applying *Wolfe* in the ERISA context).

[3] Other courts have found a six-month limitation period to be reasonable. *Id. See e.g., Thurman v. DaimlerChrysler, Inc.*, 397 F.3d 352, 357–58 (6th Cir. 2004); *Taylor v. W. & S. Life Ins. Co.*, 966 F.2d 1188, 1202–06 (7th Cir. 1992); *Njang v. Whitestone Grp., Inc.*, 187 F. Supp. 3d 172, 178–79 (D.D.C. 2016). "[B]y enacting section 1981 without a statute of limitations, Congress implied that it is willing to live with a wide range of state statutes and rules governing limitations of actions under section 1981." *Taylor*, 966 F.2d at 1205. And in Njang, then-JudgeKetanji Brown Jackson explained that a six-month limitation period for § 1981 claims is not unreasonable because, unlike Title VII claims, "there are no time-consuming procedural prerequisites that a plaintiff must satisfy before she brings her claim in court." 187 F. Supp. 3d at 179 (*citing Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 466 (1975)).

[4] Notably, the *FedEx* Limitation Provision has been litigated in a number of different courts and has been found both enforceable and unenforceable depending on the jurisdiction.

[5] *See Jones v. R.R. Donnelly & Sons, Co.*, 541 U.S. 369 (2004). Moreover, Section 1981 claims may be brought against supervisors in their individual capacities. *See, e.g., Daulo v. Commonwealth Edison*, 892 F. Supp. 1088, 1091 (N.D. Ill. 1995).

[6] *See, e.g.*, 12 Okl. St. Ann. § 95(A)(4) (1-year statute of limitations for certain torts under Oklahoma law); 735 ILCS 5/13-202 (2-year limitations period for certain torts under Illinois law);

Miss. Code Ann. § 15-1-49 (3-year statute of limitations for certain torts under Mississippi law); 21 R.C. § 2305.09 (4-year statute of limitations for certain torts under Ohio law).

[7] *See, e.g.,* Mich. Comp. Laws § 37.2101, *et seq.*

[8] *See, e.g., Thurman v. DaimlerChrystler, Inc.*, 397 F.3d 352, 358-59 (6th Cir. 2004) (affirming summary judgment for the employer on the plaintiffs' claims of sex discrimination under Michigan's Elliott-Larsen Civil Rights Act, race discrimination under Section 1981, and various state common law claims, based on six-month limitations provision in employment agreement); *Soltani v. Western & Southern Life Ins. Co.*, 258 F.3d 1038, 1044-45 (9th Cir. 2001) (affirming summary judgment for the employer on the plaintiffs' common law wrongful termination claim based on six-month limitations provision in employment agreement); *Taylor v. Western & Southern Life Ins. Co.*, 966 F.2d 1188, 1206 (7th Cir. 1992) (affirming the grant of the employer's motion to dismiss the plaintiffs' Section 1981 claim based on six-month limitations provision in employment agreement); *Vincent v. Comerica Bank*, No. H-05-2302, 2006 WL 1295494, at *5-6 (S.D. Texas May 10, 2006) (slip copy) (granting employer's motion for summary judgment on plaintiff's common law defamation claim based on six-month limitations provision in employment application); *Mayes v. DaimlerChrysler*, No. 05-70249, 2005 WL 2562780, at *6-7 (E.D. Mich. Oct. 10, 2005) (granting employer's motion for summary judgment on the plaintiff's Section 1981, common law retaliatory discharge, and state statutory sex discrimination claims, based on six-month limitations provision in employment application).

[9] *See* 29 U.S.C. § 255(a) (FLSA, EPA); 29 U.S.C. § 2617(c) (FMLA).

[10] *Compare Fink v. Guardsmark, LLC*, No. CV 03-1480-BR, 2004 WL 1857114 (D. Or. Aug. 19, 2004) (holding six-month limitation provision was enforceable against FMLA claim), *and Badgett v. Federal Express Corp.*, 378 F. Supp.2d 613, 625-26 (same), *with Conway v. Stryker Medical Div.*, No. 4:05-CV-40, 2006 WL 1008670, at *2 (W.D. Mich. April 18, 2006) (holding six-month limitation provision unenforceable against FMLA claim due to 29 C.F.R. § 825.220(d)'s prohibition against an employee's waiver of rights under the FMLA without court or U.S. Department of Labor approval), *and Lewis v. Harper Hosp.*, 241 F. Supp. 2d 769 (E.D. Mich. 2002) (same).

[11] *Boaz v. Federal Express Corp.*, 725 F.3d 603 (6th Cir. 2013)

[12] In states that do not have a state agency charged with the investigation of discrimination claims, the statute of limitations for EEOC Claims is only six (6) months. *See* 42 U.S.C. § 2000e-5(e)(1).

[13] The Age Discrimination in Employment Act employs a less burdensome administrative exhaustion process than the other EEOC Claims, allowing a lawsuit to be filed prior to the issuance of a Notice of Right-to-Sue provided that such lawsuit is filed more than sixty (60) days after the filing of a charge with the EEOC. *See* 29 U.S.C. § 626(d).

[14] *See* 42 U.S.C. § 1981a(b)(3).

[15] *See, e.g., Salisbury v. Art Van Furniture*, 938 F. Supp. 435, 437-38 (W.D. Mich. 1996) (six-month limitations provision unenforceable against ADA claim because enforcement would effect a "practical abrogation" of the right to file an ADA claim in light of administrative exhaustion requirement).

[16] *See, e.g., Thurman*, 397 F.3d at 354 (noting that the heading "READ CAREFULLY BEFORE SIGNING" in bold font in the same section as the limitation provision was sufficiently conspicuous to render the waiver enforceable).

[17] *See, e.g., Abel v. Fox*, 654 N.E.2d 591 (Ill. App. Ct., 4th Dist., 1995) (holding that continued employment may constitute adequate consideration to support a contract under Illinois law).

[18] A union would appear to have less firm footing with respect to a company's unilaterally-instituted requirement that job *applicants* be required to sign a Waiver in order to be hired, as the applicants would not be members of the union at the time they execute the Waiver.

RELATED PRACTICE AREAS

- Employment & Labor

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